2014

Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases

Kathleen M. Ridolfi
Santa Clara University School of Law, cookieridolfi@gmail.com

Tiffany M. Joslyn
National Association of Criminal Defense Lawyers

Todd H. Fries
Santa Clara University School of Law

MATERIAL INDIFFERENCE:

How Courts Are Impeding Fair Disclosure In Criminal Cases

Amendment V, U. S. Constitution

KATHLEEN "COOKIE" RIDOLFI
TIFFANY M. JOSLYN
TODD H. FRIES

The VERITAS Initiative

Supported by a grant from the Foundation for Criminal Justice.

National Association of
Criminal Defense Lawyers

1660 L Street NW, 12th Floor
Washington, DC 20036
Phone: 202-872-8600
www.nacdl.org

This publication is available online at
www.nacdl.org/discoveryreform/materialindifference

MATERIAL INDIFFERENCE:
How Courts Are Impeding Fair Disclosure In Criminal Cases

Professor Kathleen "Cookie" Ridolfi
Director, VERITAS Initiative
Santa Clara University School of Law

Tiffany M. Joslyn
Counsel, White Collar Crime Policy
National Association of Criminal Defense Lawyers

Todd H. Fries
Pro Bono Research Attorney, VERITAS Initiative
Santa Clara University School of Law

Theodore "Ted" Simon
President, NACDL
Philadelphia, PA

Gerald B. Lefcourt
President, FCJ
New York, NY

Norman L. Reimer
Executive Director, NACDL
Washington, DC

Professor Lisa A. Kloppenberg
Dean, Santa Clara University School of Law
Santa Clara, CA

TABLE OF CONTENTS

ABOUT THE VERITAS INITIATIVE OF SANTA CLARA UNIVERSITY SCHOOL OF LAW

The Veritas Initiative (VERITAS Initiative) is a program of Santa Clara University School of Law. The mission of the VERITAS Initiative is to advance the integrity of the justice system through research and data-driven reform. The VERITAS Initiative was founded in the fall of 2010 with the release of the most comprehensive statewide study ever undertaken on prosecutorial misconduct in state and federal courts. The work of the VERITAS Initiative has prompted national dialogue on the fair administration of justice and the critical importance of accountability in the justice system.

For more information contact:

VERITAS Initiative
Santa Clara University School of Law
500 El Camino Real
408-554-4993
veritasinitiative.scu.edu

SANTA CLARA LAW est. 1911

The VERITAS Initiative

ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime … Foster the integrity, independence and expertise of the criminal defense profession … Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 10,000 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice, NACDL's supporting organization.

For more information contact:

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street NW, 12th Floor
Washington, DC 20036
202-872-8600
www.nacdl.org

ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) preserves and promotes the core values of the American criminal justice system — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by supporting programs to educate the public on the role of these rights and values in a free society; and by preserving these rights through resources, education, training, and advocacy tools for the nation's criminal defense bar.

The FCJ believes that when someone is accused of misconduct, justice is only possible when the accused can effectively test the propriety and legality of the government's invocation of its power to prosecute. Justice is denied when someone accused of misconduct lacks universal and timely access to information that could expose a wrongful prosecution. Due process and respect for fundamental constitutional principles must be safeguarded in all criminal prosecutions.

The FCJ is incorporated in the District of Columbia as a 501(c)(3) non-profit corporation. All contributions to the FCJ are tax-deductible. The affairs of the FCJ are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the FCJ's own Articles of Incorporation, and its Bylaws.

For more information contact:

FOUNDATION FOR CRIMINAL JUSTICE
1660 L Street NW, 12th Floor
Washington, DC 20036
202-872-8600
www.nacdl.org/foundation

ACKNOWLEDGMENTS

This study and report are the product of a collaborative project between the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative). The authors would like to thank Dean Lisa A. Kloppenberg, Santa Clara University School of Law, as well as NACDL President Theodore Simon, the officers and directors of NACDL, the Foundation for Criminal Justice (FCJ), and FCJ President Gerald Lefcourt and, the FCJ Board of Trustees for their support.

Many individuals provided invaluable guidance, oversight, and support for this project, but none more than Norman L. Reimer, Executive Director of NACDL. The success of this project is possible because of the dedicated efforts, insightful analysis, and critical editorial work provided by Quintin Chatman, Ivan Dominguez, Kyle O'Dowd, and Shana-Tara Regon. Jessica Seargeant had a key role in the development of the study's analytic framework and the execution of the decision review process.

Santa Clara University Professor Eleanor Walker Willemsen developed and conducted the statistical analyses supporting some of this study's findings. The design and publication of this report would not be possible without the creative efforts and hard work of NACDL's Art Director Catherine Zlomek, Freelance Graphic Designer Jason Rogers, and NACDL Graphic Designer Jennifer Waters. Several law clerks and interns from both organizations provided valuable assistance as well.

The authors wish to thank the numerous practitioners who volunteered to review decisions and coding. These practitioners include: Maitreya Badami, Daryl A. Bloomberg, William Buckman, Brett Burns, Jean-Jacques "J" Cabou, Judy Clarke, Josh Cohen, Todd Foster, Daniel Gelb, Bill Genego, John Wesley Hall, Rodger A. Heaton, Bonnie Hoffman, Tracy Miner, Don Rehkopf, John "Bud" Ritenour, Melinda Sarafa, John Scardamaglia, Jodi Thorp, Richard Westling, Bill Wolf, and Professor Ellen Yaroshefsky.

Finally, the authors are especially grateful to Rob Cary, Professor Bennett Gershman, Peter Goldberger, Professor Ellen Kreitzberg, David Ogden, Irwin Schwartz, Professor Linda Starr, Professor Gerald Uelmen, and Professor Ellen Yaroshefsky for reviewing drafts of the report and offering candid and helpful feedback.

Despite these acknowledgments, any errors or omissions in the study or report are solely the responsibility of the authors.

FOREWORD

The criminal justice system is always a work in progress, and its architects need to stay tirelessly at the project of finding and implementing the right incentives and safeguards. In 2009, the new leadership of the Department of Justice — of which I was a part — confronted a critical aspect of that project, fundamental issues relating to *Brady v. Maryland* and the issue of prosecutorial disclosure in criminal cases. Responding to the very painful experience of the failed Senator Ted Stevens prosecution, early in 2010 we implemented changes in Department policy meant to provide direction and resources to prosecutors in fulfilling their obligations to disclose favorable information. In announcing those changes, we observed that federal prosecutors' duty is to "seek justice," and spoke about the "truth-seeking role of the prosecutor." I believe today as I did then that the Department's lawyers are dedicated to these principles, and in the overwhelming majority of cases succeed admirably in serving them in letter and spirit. But of course prosecutors have a dual role; though they are ultimately seekers of justice and the truth, they are of course tasked as a primary matter with seeking convictions of those they believe are guilty of crimes. That is obviously an enormously important function. And advocates pursuing a valid and important goal may tend to view things through a particular lens, no matter how hard they try to get their calls right. So certainly, judges have an indispensable role and obligation to oversee the system's guarantees of fairness and to make sure that its truth- and justice-seeking mission is fulfilled in each case.

There is no more important judicial role. The issue of fair disclosure relates to the most fundamental criminal justice issue of all — the guilt or innocence of the accused. Whether, when, and how the prosecution shares information with the defense also goes directly to the integrity of our legal system, the participants in it, and our institutions of justice. Defense counsel have limited discovery tools at their disposal — and lamentably, in the typical criminal case, often have very limited resources to conduct their own investigations. If the prosecution for whatever reason fails to disclose information favorable to the defense, this may well mean that it never comes to light. No greater harm can be done by our criminal justice system than conviction of innocent people. And we know from tragic experience that our system — despite its many virtues — is capable of reaching wrong results. Progress here as in any proper policy exercise depends on continued respect for all of the legitimate values at stake, including here, centrally, the rights of accused persons to have access to favorable information; but also important or compelling equities of the government, including (in some cases) concerns about the safety of witnesses or even national security concerns. Considering the rules and approaches by which judges accommodate those critical interests is obviously of central importance to the project.

I do not hold myself out as sufficiently expert in the case law or the methodology to have an informed opinion about all of this study's findings and conclusions. In an official role, I may have disagreed with some of them in the past. But by focusing on the shape of legal rules, and by connecting its prescriptions to data, I do believe that this paper contributes to our urgent and permanent collective project of seeking a criminal justice system with incentives and safeguards that best allow the government to obtain convictions of the perpetrators of crimes while protecting innocent people from wrongful conviction.

David W. Ogden
Chair, Government and Regulatory Litigation Group,
Wilmer Cutler Pickering Hale and Dorr LLP;
Deputy Attorney General of the United States, 2009-2010

EXECUTIVE SUMMARY

The integrity of the criminal justice system relies on the guarantees made to the actors operating within it. Critical to the accused is the guarantee of fair process. For the accused, fair process includes not only the right to put on a defense, but to put on a complete defense. The U.S. Supreme Court recognized the importance of this guarantee over 50 years ago, in *Brady v. Maryland*, when it declared that failure to disclose favorable information violates the constitution when that information is material. This guarantee, however, is frequently unmet. In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The high-profile cases of Senator Theodore "Ted" Stevens and Michael Morton put a spotlight on this unfulfilled promise. The prosecutors in these cases possessed information favorable to the defense but failed to disclose it. Convinced of the defendants' guilt, they worked to build cases against them while ignoring information which tended to undercut their own view of the defendants' guilt. Both Senator Stevens and Michael Morton prevailed in clearing their own names, but countless others deprived of favorable information remain incarcerated or stained with a criminal record. Despite the reform that Morton's ordeal spawned in Texas, the federal system in which Senator Stevens was prosecuted remains the same and disclosure violations continue in state and federal cases nationwide.

In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The frequency with which these violations occur and the role they play in wrongful convictions prompted the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative) to come together to look at the problem from a different perspective. Many have heard about the problem of prosecutors engaging in misconduct by failing to disclose favorable information. The focus of such scholarship is typically on the individual prosecutor's behavior or the culture and policies of a particular prosecution office. Rather than look at the prosecution, with this study, NACDL and the VERITAS Initiative ask: What role does judicial review play in the disclosure of favorable information to the accused?

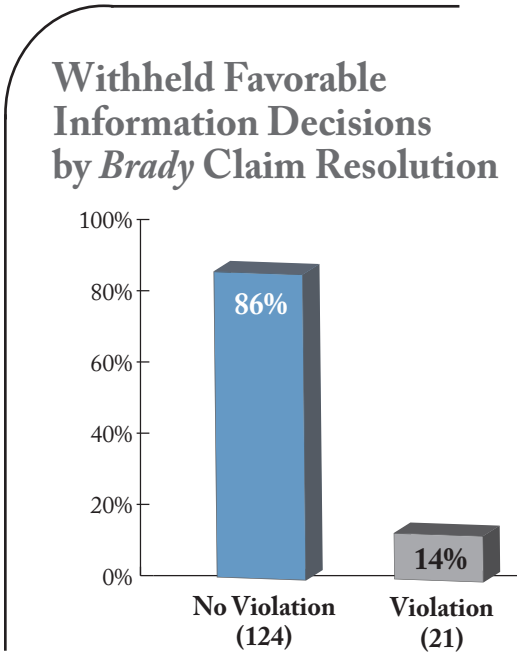
To answer that question, the authors took a random sample of *Brady* claims litigated in federal courts over a five-year period and assessed the quality and consistency of judicial review of the claims. The sample included 620 decisions in which a court ruled on the merits of a *Brady* claim. Guided by an extensive methodology, the review of these decisions included evaluating the materiality analysis employed by the courts and a variety of other factors and characteristics. The firsthand review of each decision in the sample and statistical analysis of the data as a whole reveals a variety of problems and answers the question motivating the study — through judicial review, the judiciary plays a significant role in impeding fair disclosure of favorable information.

KEY FINDINGS

◆ The Materiality Standard Produces Arbitrary Results and Overwhelmingly Favors the Prosecution

The authors reviewed, analyzed, and coded each of the 620 decisions that decided a *Brady* claim on the merits. This process revealed that courts apply the materiality standard in an arbitrary manner. Two courts could have the same favorable information before them in remarkably similar factual contexts and come out differently on the question of materiality.

Despite the arbitrary application of the materiality standard, the data shows that it overwhelmingly favors the prosecution. Of the 620 decisions in the Study, prosecutors failed to disclose favorable information in 145. The defense prevailed in just 21 of these 145 decisions — that is, in only 14 percent of these decisions did the court deem the undisclosed favorable information material and find that a *Brady* violation had occurred. The courts ruled in favor of the prosecution in the remaining 86 percent of these decisions.

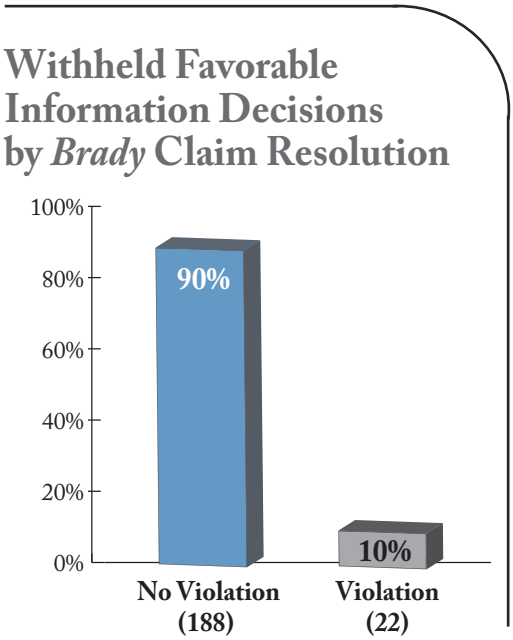


◆ Late Disclosure of Favorable Information Is Almost Never a *Brady* Violation

When the prosecution discloses favorable information late, the prejudice to the defense can be the same as if the prosecution did not disclose the information at all. The study included 65 decisions in which the prosecution disclosed favorable information late. The majority of these late disclosures occurred during trial, and statistical analysis reveals that statements, rather than other types of information, are more likely to be disclosed late. Only one court, out of these 65 decisions, held that the prosecution's late disclosure violated *Brady*. In the other 64 decisions, the court rejected the notion that the prejudice to the defense was sufficient to constitute a *Brady* violation.

The defense lost in 90 percent of the decisions in which the prosecution withheld favorable information.

EXECUTIVE SUMMARY



The Prosecution Almost Always Wins When It Withholds Favorable Information

The prosecution prevailed on the question of materiality in 86 percent of the decisions in which it failed to disclose favorable information, and its odds improved when late disclosure decisions are included. In 90 percent of the decisions in which the prosecution withheld favorable information — disclosed it late or never at all — the defense lost. The courts held that the prosecution's withholding of favorable information violated *Brady* in just 10 percent of these decisions.

Withholding Incentive or Deal Information Is More Likely to Result in a *Brady* Violation Finding

The defense was more likely to prevail on its *Brady* claim when the information at issue was an incentive or deal for a witness to testify. Despite being just 16 percent of the Study Sample, decisions involving incentive or deal information make up over one-third of the decisions resolved by a finding that *Brady* was violated. Further, the statistical analysis revealed a strong correlation between this type of impeachment information and findings that the prosecution violated *Brady*.

Courts 'Burden Shift' When They Employ the Due Diligence 'Rule' Against the Defendant

When the prosecution fails to disclose favorable information, courts sometimes use the due diligence rule to excuse this failure and deny a defendant's *Brady* claim. This occurred in just over three percent of the decisions. Employing the due diligence rule shifts the court's inquiry away from the prosecution's failure to satisfy its disclosure obligation, and to the defense's failure to discover the favorable information on its own. By treating the discovery process like a game of hide-and-seek, the due diligence rule runs counter to the guarantee of fair process.

This study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information.

◆ Death Penalty Decisions Are More Likely to Involve Withheld Favorable Information and to Be Resolved With a 'Not Material' Finding

Favorable information was withheld or disclosed late by the prosecution in 53 percent of the decisions involving the death penalty, but only 34 percent of all the decisions studied. And, in death penalty decisions, withheld favorable information was more likely to be found not material. Nearly two-thirds of the death penalty decisions resulted in a finding that the withheld information was not material. By comparison, only one-third of all the decisions studied were resolved with a not material finding.

Mechanisms for Increasing Disclosure of Favorable Information

The judiciary plays a significant role in the fair disclosure of, and defense access to, favorable information. More specifically, this study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging prosecutors from disclosing information that does not meet the high bar of materiality. Thus, any attempt to address the problems identified in this study must come from the judiciary or, should it fail to act, the legislature.

This report offers three reform mechanisms that can be applied by the judicial and legislative branches at both the state and federal levels.

The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process.

◆ Ethical Rule Order — A Court Order for Disclosure of Favorable Information in Criminal Proceedings

In each case, defense attorneys should request, and judges should grant, orders for the prosecution to disclose all favorable information in accord with ABA Model Rule 3.8(d). This order, known as an Ethical Rule Order, would bind prosecutors and make it possible for judges to sanction those prosecutors who fail to comply. If defense attorneys and judges make this order the norm for a particular court, jurisdiction, or even the entire judicial system, it will serve to deter willful non-disclosure. This is even more effective when judges or courts issue a standing order for all their cases. The Ethical Rule Order is one way that individual defense attorneys and judges can obtain immediate results in a particular criminal proceeding, while simultaneously encouraging broader change in disclosure practices and helping to prevent the problematic practices identified by this study.

◆ Amendment of Judicial Rules and Policies Governing Disclosure

Another mechanism for increasing fair disclosure and preventing the type of arbitrary practices evidenced by this study is amendment of judicial rules. In many jurisdictions, the judicial branch sets forth the rules that regulate the prosecution's disclosure obligations, which are then enforced by every court within that jurisdiction. These rules are often set by the highest court in a jurisdiction or, as in the federal system, a group of judges that are representative of the various courts within the system. As a result, judicial branches nationwide are well-positioned to respond to the failure of the prosecution to disclose favorable information in a timely fashion. Amendment of court rules and policies to require fair disclosure of information could decrease the sort of prosecutorial gamesmanship that has become commonplace and help restore balance to the justice system.

◆ Legislation Codifying Fair Disclosure

The most effective mechanism for reform of prosecutorial disclosure practices could come through the legislative branch. Legislation that sets forth a clear mandate for disclosure of favorable information, as well as comprehensive rules for the disclosure process, would have a significant system-wide impact. The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process. Codifying a fair disclosure process could increase defense access to favorable information and help prevent the problems identified in this study. Further, enactment of this reform may deter prosecutorial gamesmanship in the discovery context and decrease *Brady* claims system-wide.

Conclusion

Courts are impeding fair disclosure in criminal cases, and in so doing, encouraging prosecutors to disclose as little favorable information as possible. With *Brady*, the Supreme Court held that non-disclosure only violates the Constitution when the information is material. This holding established a post-trial standard of review that many prosecutors have adopted as the pre-trial standard governing their disclosure obligations. Despite ethical rules that set forth a disclosure obligation far broader than *Brady*, many prosecutor offices, and even some courts, have taken the same incorrect position — prosecutors need only disclose as much as necessary to ensure the conviction survives appeal.

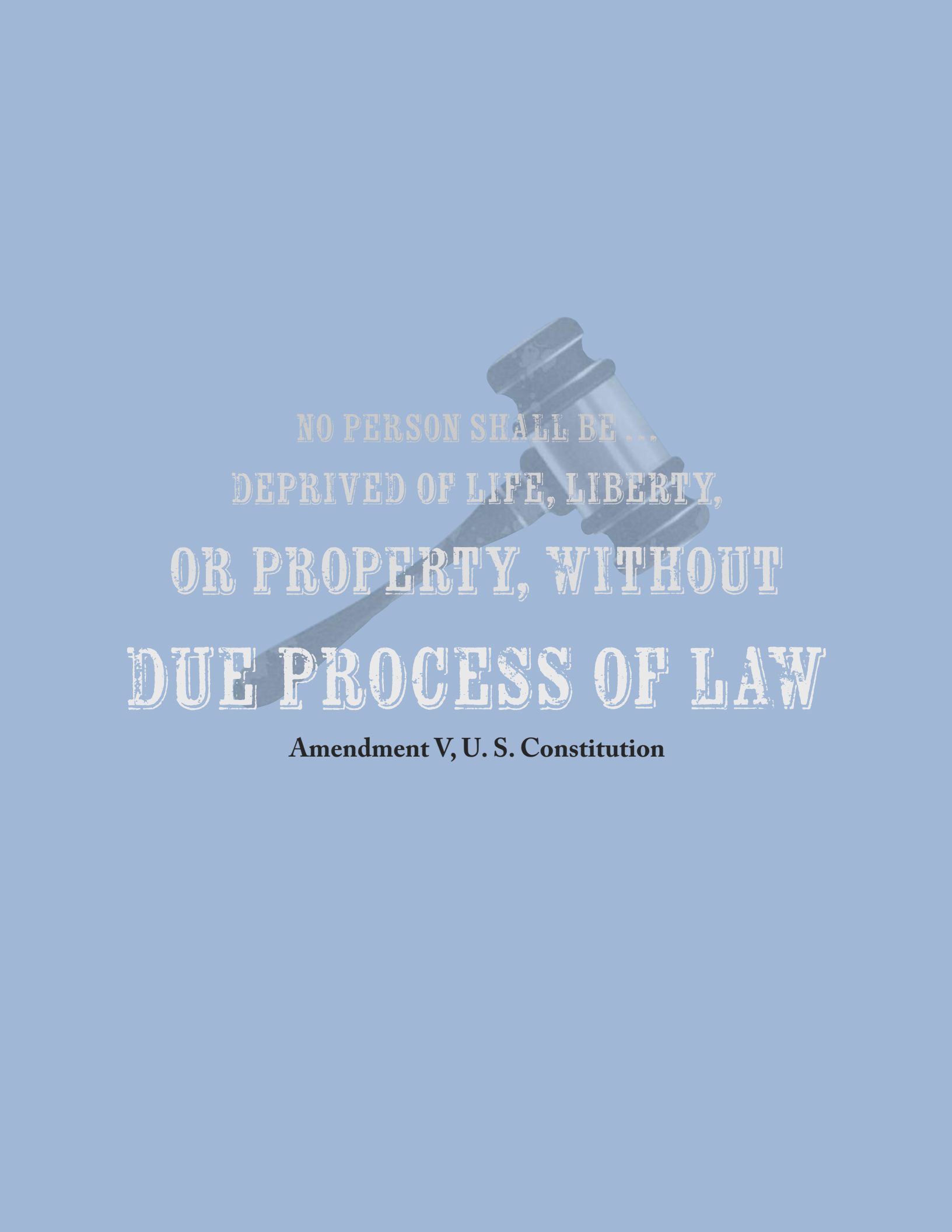
EXECUTIVE SUMMARY

Across the nation prosecutors are guiding their disclosure obligations by a post-trial standard that some courts have decried as unworkable in the pre-trial context. Prosecutors are ill-equipped to apply a post-trial standard to a pre-trial obligation without the benefit of the defense perspective and with their natural biases as zealous advocates. Taking their cues from the courts, prosecutors are acting to the detriment of the defense and fair process.

This study demonstrates that the odds are in favor of prosecutors who withhold favorable information. Courts are rarely finding that the withholding of favorable information is prejudicial enough to constitute a *Brady* violation. Strict judicial adherence to the materiality standard without regard to the integrity of the process is a direct endorsement of non-disclosure of favorable information.

Until courts embrace a broader disclosure obligation, such as that embodied in the ABA Model Rules, and reject the premise that a prosecution's obligation is measured solely by *Brady*, they will continue impeding disclosure of favorable information. The status quo of material indifference must yield to the guarantee of fair process. Whether it comes through individual courts, the judiciary, or legislative action, reform is necessary.

The status quo of material indifference must yield to the guarantee of fair process.



Amendment V, U. S. Constitution

I. INTRODUCTION*

Fifty years ago in ***Brady v. Maryland***, the U.S. Supreme Court recognized the constitutional importance of providing a person accused of a crime with **favorable information** and declared that failure to do so violates due process when that information is "material" either to guilt or punishment.[1] Yet, studies over the last 10 years have conclusively demonstrated that this duty is often left unfulfilled.[2] Recent high profile wrongful convictions such as those of the late U.S. Senator Ted Stevens, Michael Morton, and John Thompson have shaken public confidence in the justice system and elevated the issue of ***Brady* violations** in the public arena. These cases and others like them show how devastating the consequences can be when favorable information is not disclosed to those facing criminal charges.[3]

After over 50 years of discussion, debate, scholarly articles, and conferences, "state and federal criminal justice systems appear less than adequate in assuring the prosecutorial disclosure obligations are met."[4] The growing visibility of wrongful convictions and the countless anecdotes of prosecutors withholding favorable information prompted the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative) to undertake the study that is the subject of this report. The authors took a random sample of *Brady* claims litigated in federal courts over a five-year period and assessed the quality and consistency of judicial review of such claims. Focusing on the courts, this study seeks to understand the particular impact of judicial review on defendants' access to favorable information in criminal cases.

The impact of withholding favorable information extends beyond the question of guilt or innocence. When this occurs, the integrity of the entire system is at stake.

At the outset, NACDL and the VERITAS Initiative acknowledge that this study only scratches the surface of this problem. The question of how often prosecutors violate *Brady v. Maryland* is impossible to answer because, by its very nature, the withholding of *Brady* material is hidden, and withheld information may never surface. The number of cases in which a judge or jury may have convicted an innocent person, without becoming aware of all the favorable information actually in existence, remains unknown. One can fairly assume that for every wrongfully convicted individual who has been vindicated, there are countless others whose innocence remains invisible to the system.

The impact of withholding favorable information extends beyond the question of guilt or innocence. And, ramifications extend beyond the right of the accused to present a defense. When deprived of favorable information, the right of an accused to due process is violated and the role of the judge and jury as fact-finder is compromised. When this occurs, the integrity of the entire system is at stake.

---

*The Report Glossary is located at Appendix B. Any word or phrase contained in the Report Glossary will appear in **bold** the first time it appears in the report text.

The failure to timely produce favorable information to the defense is also a significant factor in the conviction of innocent people. When researchers for the Innocence Project looked at DNA exoneration cases[5] involving documented appeals and/or civil suits alleging prosecutorial misconduct, 42 percent alleged *Brady* violations — non-disclosure of favorable information that would have made a difference in the outcome of the case.[6] Unfortunately, when DNA is unavailable, or it is not relevant to a case, many individuals wrongly convicted because of the failure to disclose favorable information may never get justice.

The case of John Thompson illustrates what can happen when favorable information is not disclosed. On Dec. 6, 1984, Ray Liuzza, an executive from a prominent New Orleans family, was robbed and murdered near his home.[7] The murder received widespread public attention, leading to an intensive police investigation and the Liuzza family offering a $15,000 reward for information leading to a conviction.[8] Soon thereafter, acting on a tip, the police arrested John Thompson and prosecutors charged him with the murder.[9]

For 18 years, the New Orleans District Attorney had withheld from the defense test results that conclusively established someone other than Thompson committed the carjacking.

On Dec. 28, 1984, not far from the Liuzza murder scene, three teenagers were carjacked at gunpoint and assaulted.[10] Based on a news photo connected to the Liuzza murder, the teens identified their carjacker as John Thompson.[11] For strategic reasons, prosecutors obtained a conviction against Thompson in the felony carjacking case before trying him for the murder.[12] Prosecutors brought the carjacking charge to trial first because the felony conviction could serve as the basis for elevating the homicide to a capital case and deter Thompson from testifying at the murder trial in his defense.[13] Thompson was ultimately convicted of the Liuzza murder and sentenced to death.[14]

After 18 years in prison, 14 of which he spent on death row, Thompson was facing his seventh execution date when a defense investigator made a critical discovery. She learned that the carjacking perpetrator's blood was found on one of the victims' pants leg.[15] Although the authorities had tested the blood as part of their investigation, the results were not disclosed to the defense. The test results conclusively established that someone other than Thompson committed the carjacking.[16] For 18 years, the New Orleans District Attorney had withheld these test results from the defense.[17] When the blood test results became known, Thompson was exonerated in the carjacking case and the trial court immediately stayed his execution.[18]

For the next three years, John Thompson fought for and gained a reversal in the murder case on the ground that the carjacking conviction had "unconstitutionally deprived [him] of his right to testify … at the murder trial."[19] Undeterred, the prosecutors retried Thompson for the Liuzza murder.[20] In preparation for this second murder trial, the defense uncovered even more information that the government had withheld, information that bolstered Thompson's defense.[21] The jury took only 35 minutes to return a verdict of not guilty.[22] After nearly two decades, John Thompson was vindicated and released.[23]

John Thompson was 22 years old and living in a public housing project in New Orleans at the time of his arrest. Two years later, in another part of the country, 32-year-old Michael Morton was living in a middle-class Texas suburb when his life took a

similarly tragic turn.[24] On Aug. 13, 1986, Morton's wife was brutally murdered in their home. In a deeply disturbing chain of events, Morton was arrested, charged, and ultimately convicted of her murder. Michael Morton spent 25 years behind bars before DNA evidence established his innocence[25] and he was exonerated.[26]

The post-conviction DNA litigation unveiled information even more disturbing than the conviction of an innocent man; it revealed that the government had obtained that conviction by failing to disclose favorable information to the defense in violation of *Brady v. Maryland*.[27] Eleven days after witnessing his mother's murder, Eric Morton, the three-year-old son of Michael and Christine Morton, told his grandmother Rita Kirkpatrick what he saw.[28] Despite the trauma of the event, Eric was able to describe the crime scene and murder in great detail. He stated that a "monster," not his father, had attacked his mother and that his "Daddy" was "not home" when it happened.[29] Eric's grandmother brought this information to the police and, although it was recorded in the notes of the lead investigator, the information never reached the defense.[30]

When the defense team raised the possibility that something was amiss, prosecutors provided the trial judge with a sealed file of that investigator's notes and reports. The sealed file did not include two critical pieces of information — young Eric's eyewitness account and the statements of the Mortons' neighbors who told the police that a man in a green van had repeatedly parked on the street behind the Mortons' home and walked off into the nearby wooded area.[31] This information would have provided material support to Michael Morton's defense that an intruder came into his home and brutally victimized his wife. This information was withheld from the defense and intentionally suppressed during the trial court's pre-trial discovery inquiry. Absent the presence of DNA evidence in Morton's case, this other undisclosed information would have remained hidden forever.

"This court cannot think of a more intentionally harmful act than a prosecutor's conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and life sentence."

— In re Honorable Ken Anderson (A Court of Inquiry)

As Morton sat in prison for a crime he did not commit, the man who was ultimately convicted of killing Christine Morton is suspected of taking another life — Debra Master Baker in Travis County, Texas — in the same brutal manner.[32] Meanwhile, Morton watched his relationship with his son Eric grow distant and eventually fall into disarray, while the prosecutor who withheld this information went on to win election to become a Williamson County District Judge.[33]

In February 2011, during a formal "Court of Inquiry," a rare legal proceeding for the purpose of reviewing a prosecutor's conduct, Morton explained to the court that although he does not seek "revenge" or "anything ill" for the prosecutor, he realizes "that there needs to be accountability" because, "[w]ithout that, every single thing falls apart."[34] In the court order following the proceeding, the presiding judge wrote: "This court cannot think of a more intentionally harmful act than a prosecutor's conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and life sentence."[35]

Despite their different backgrounds — Thompson, an African-American man living in public housing, and Morton, a white man living in middle-class suburbs — their stories are eerily similar. They demonstrate the significant human wreckage that can result from a system that fails to ensure defendants access to information favorable to their case. The problem is not limited by race or class and transcends types of crime and the boundaries of state and federal jurisdiction. In fact, one of the most notable and recent examples of the damage caused by the withholding of *Brady* material involves a longtime U.S. senator and allegations of corruption.

Theodore Fulton "Ted" Stevens served in the U.S. Senate for over 40 years, from December 1968 to January 2009. He was the longest-serving Republican senator, holding the position of majority whip of the Senate twice, serving as president pro tempore of the Senate once, and being only the third senator to hold the title of president pro tempore emeritus. Despite this lifelong commitment to public service, Senator Stevens' career did not end with the dignity traditionally afforded a dedicated public servant. Rather, his service was taken from him, along with his reputation, through a miscarriage of justice.

From the start, the prosecution of Senator Stevens was permeated with *Brady* violations, making it impossible for the senator to receive a fair trial.

On July 29, 2008, during his re-election campaign, a federal grand jury indicted Senator Stevens on seven counts of criminal ethics violations for failing to report gifts related to renovations of his home.[36] Maintaining his innocence and attempting to clear his name prior to Election Day, the senator invoked his right to a speedy trial by jury. On Oct. 27, 2008, the jury returned a verdict of guilty on all counts and, approximately one week later, the Alaska electorate replaced their senior senator with his challenger.[37] It was only after this electoral defeat, and shortly before his tragic passing, that Senator Stevens was finally exonerated.[38]

From the start, the prosecution of Senator Stevens was permeated with *Brady* violations, making it impossible for the senator to receive a fair trial.[39] During a pre-trial interview, for example, the government's star witness, Bill Allen, stated that he believed Senator Stevens would have paid construction bills if they were sent to him.[40] This statement was crucial information for the defense, as the senator's knowledge of and intent to pay constructions bills was the main issue in the case.[41] The government did not give this statement to the defense. In addition, during the trial the government also withheld exculpatory statements made by renovation foreman Rocky Williams during pre-trial interviews. They also refused to provide the defense with grand jury testimony of Williams in which he reiterated the exculpatory statements. Prosecutors argued that the testimony was not "*Brady* material."[42]

These are just a few examples of the *Brady* violations exacted upon Senator Stevens. It was only after a whistleblower pulled back the curtain on this unjust prosecution that the senator's indictment was eventually dismissed.[43] The decision to move for dismissal ultimately came from Attorney General Eric Holder himself, following a review of the case by a new team of Department of Justice lawyers.[44] Granting the government's motion for dismissal, U.S. District Court Judge Emmet G. Sullivan stated, "'There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect.'"[45] He then ordered an investigation into the government's conduct, noting that "[t]he

government's ill-gotten verdict in the case not only cost that public official his bid for re-election, the results of that election tipped the balance of power in the United States Senate."[46] The investigation could not, however, undo the damage to the senator's reputation and legacy, all the more irreparable due to his tragic passing.

Thompson, Morton, and Stevens were all ultimately vindicated because they were able to discover undisclosed information that proved their claims. Although this study has the benefit of their stories, it is constrained by the undeniable fact that an unknowable number of *Brady* violations are hidden and no methodology, no matter how elaborate, can account for such cases. Any study of *Brady* violations will be incomplete — the full scope of the problem is simply unascertainable. For those cases that are visible, however, there is much to be learned.

The Thompson, Morton, and Stevens cases are exceptional not only because the undisclosed information surfaced, but because courts concluded that the non-disclosures amounted to constitutional violations. Even when undisclosed information surfaces, it is rare for the justice system to afford the defendant a remedy. This unfortunate reality is in part what motivates this study. Any attempt to alter the status quo requires an understanding of the role judicial review plays in shaping the dynamic between what *Brady v. Maryland* requires and what actually happens in practice. As such, the primary objective of this study was to review a sufficient number of court decisions in order to provide a fair assessment of the quality and consistency of judicial review by courts deciding claims under *Brady v. Maryland*.

In support of that objective, the study applies a detailed analytic methodology to a random sample of *Brady* claims litigated in federal courts over a five year-period[47] in order to answer the following

Even when undisclosed information surfaces, it is rare for the justice system to afford the defendant a remedy.

questions: (1) To what extent are courts consistent in the use and application of the materiality standard when deciding *Brady* claims? (2) What other issues or factors are there underlying courts' resolutions of *Brady* claims? (3) To what extent is favorable information being withheld from the defense? These questions focus on the courts and judicial review of claims brought under *Brady v. Maryland*, as opposed to the prosecutors and the line distinguishing ethical behavior from prosecutorial misconduct. Rather than critique individual actors within the system, the study seeks to assess the system as a whole. This is consistent with the objective of the study: to understand the role judicial review plays in shaping disclosure of favorable information in criminal cases.

The report that follows attempts to set forth the answers to these questions and to document central themes that emerged from review of the **Study Sample**. As a prelude to the study's findings, the report also provides a brief history of the development of *Brady* claims and the gradual erosion of due process rights under *Brady v. Maryland*, as well as the methodology employed in the study. The findings demonstrate that the deep concerns motivating the study are, in fact, well-founded. Specifically, the data reveals several troubling, recurring issues regarding how courts analyze *Brady* claims and that application of the materiality standard overwhelmingly favors the government and produces arbitrary results. In light of these findings, the report concludes with a discussion of various reform proposals and how, if implemented, such proposals would help prevent these problems and increase fair disclosure in the future.

II. HISTORY AND DEVELOPMENT OF THE *BRADY* DOCTRINE

In *Brady v. Maryland*, the U.S. Supreme Court held that the prosecution has the duty to furnish favorable information to the accused and that failure to do so "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[48] John L. Brady was convicted of capital murder and sentenced to death. Only after an unsuccessful appeal did he learn the prosecution had withheld a statement that could have mitigated his death sentence. Upon seeking post-conviction relief, the state appeals court held that "suppression of the evidence by the prosecution denied [Brady] due process of law," and remanded the case for retrial of the question of punishment, not the question of guilt.[49] Affirming this decision, the U.S. Supreme Court concluded that "the withholding of this particular confession [] was prejudicial to the defendant Brady" and he was entitled to relief.[50]

No matter how favorable to the defense, if the undisclosed information is not deemed material, then there is insufficient prejudice to constitute a *Brady* violation.

With this decision, "the Supreme Court established an approach to analyze a case retrospectively to determine whether a defendant received a fair enough trial under general due process standards."[51] To obtain relief under the *Brady* rule, the accused must show that the information (1) was not disclosed by the prosecution; (2) is favorable to the accused;[52] and (3) is material either to guilt or punishment. If all three requirements are met, then a *Brady* violation has occurred and the constitutional due process right of the accused has been violated.

No matter how favorable to the defense, if the undisclosed information is not deemed material, then there is insufficient prejudice to constitute a *Brady* violation. Although the Court established this materiality requirement in the *Brady* decision, its contours were not defined until later in subsequent decisions. The two most common articulations of the materiality standard come from two Supreme Court decisions referenced in *Strickler v. Greene*.[53] In *Strickler*, relying on its decision in *Bagley,* the Court held that information is material only if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense."[54] Quoting from its decision in *Kyles*, the Court further explained that "'[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"[55] Despite the prominence of the ***Bagley*** and ***Kyles*** **standards**, lower courts sometimes articulate the materiality requirement in different ways that increase or decrease the burden on the accused.[56]

The *Brady* decision was part of a judicial movement led by Justice Oliver Wendell Holmes that expanded criminal due process from the basic procedural requirement of "notice and opportunity to be heard," to the more meaningful concepts of "substantive justice" and "fair trial."[57] The *Brady* decision was one in a series of decisions by the Supreme Court that incorporated important procedural rights for defendants and did so in ringing moral tones. "These opinions possess special rhetorical power because they were expressly based on fundamental values like equality, human dignity, morality of government, protection of the oppressed, and privacy."[58]

The *Brady* decision was no exception. Concluding the government's conduct violated Brady's 14th Amendment right to due process, Justice William O. Douglas wrote,

> A prosecution that withholds evidence … which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant [and] casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice [.][59]

Further, Justice Douglas explained, "Society wins not only when the guilty are convicted but when criminal trials are fair," and underscored his message by quoting the grand language inscribed on the walls of the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts."[60]

At its inception, the *Brady* rule, through its disclosure mandate,[61] offered new hope for the strengthening of fair trial rights. In the ensuing decades, however, the Court took *Brady* in two somewhat opposing directions. It expanded the reach of the *Brady* rule in several specific instances while at the same time it limited its application by narrowing the definition of materiality. The Court expanded the reach of *Brady* to include information not specifically requested by the defendant,[62] information that may be used to impeach government witnesses,[63] and information in the control of government agents regardless of whether the prosecutor was aware of the information.[64] In light of these decisions, "*Brady* appear[ed] to be an expanding doctrine into which the Court ... injected flexibility to reflect the realities of criminal prosecutions."[65]

The current permutation of *Brady* is a hindrance to a "defendant's access to the kind of exculpatory evidence whose disclosure *Brady* held to be fundamental to due process."

— Professor Alafair Burke

But at the same time, and in subsequent decisions, the Court was in other ways moving away from a broad interpretation of the doctrine to a narrower definition of materiality and stricter application of the rule.[66] The Court did this by driving home that *Brady* did not create a right to discovery *per se*, but rather acknowledged a Constitutional Due Process[67] right to a fair trial that includes a right to discovery of favorable information — that is exculpatory or impeaching information of such importance that if omitted would create "a reasonable doubt of guilt that did not otherwise exist."[68] This narrowing has led at least one scholar, Professor Alafair Burke, to describe the current permutation of *Brady* as a hindrance to a "defendant's access to the kind of exculpatory evidence whose disclosure *Brady* held to be fundamental to due process."[69]

But the analysis does not end there. The parameters of a prosecutor's obligation to disclose favorable information, and a defendant's corresponding right to access that information, are not defined entirely by *Brady*, and the Court has repeatedly said so. Despite the Court's unwillingness to expand a defendant's due process right to information not constrained by the "materiality" test, it has been reminding prosecutors all along that they are ethically bound under professional rules to a broader disclosure obligation beyond what the Constitution provides a defendant.[70] The Court has long encouraged the "prudent prosecutor to resolve doubtful questions in favor of disclosure."[71]

As the Court has emphasized, a prudent and ethical prosecutor discloses more than what is constitutionally required.

The Court has, on multiple occasions, underscored the difference between what is required under *Brady* to sustain a conviction and the course an ethical prosecutor must take. The *Brady* standard used by courts following a conviction is not the rule by which prosecutors should abide when making disclosure determinations prior to conviction. In 1999, in *Strickler v. Greene*, the Court referred to this broad disclosure obligation when it distinguished between "material" favorable information that must be disclosed under the Due Process Clause and non-material favorable information that a prosecutor has a "duty to disclose."[72]

> [T]he term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence — that is, to any suppression of so-called '*Brady* material' — although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.[73]

Through this discussion of "so-called '*Brady* material,'" the Court was actively encouraging prosecutors to turn over non-material favorable information.[74]

A decade later in *Cone v. Bell*, the Court provided additional support for this point:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.[75]

The prosecutor's affirmative duty to disclose is separate and apart from the post-trial standard of review embodied in the *Brady* rule. And, as the Court has emphasized, a prudent and ethical prosecutor discloses more than what is constitutionally required.

These somewhat disparate views on prosecutorial disclosure obligations are not confined to the Court's dicta. For example, the American Bar Association (ABA) has established a disclosure obligation far broader than that recognized by the Department of Justice (DOJ) in its own guidance to prosecutors. In Formal Opinion 09-454, the ABA Standing Committee on Ethics and Professional Responsibility acknowledged the variety of sources governing disclosure

obligations, but held that prosecutors "have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct."[76]

The ABA Model Rules establish an "independent" duty, "more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome."[77] This duty "requires prosecutors to disclose favorable evidence so that the *defense* can decide on its utility."[78] And, unlike the constitutional decisions, the ethics rule does not "establish an after-the-fact, outcome-determinative 'materiality' test."[79]

In contrast, in a Jan. 4, 2010, memo to all DOJ prosecutors, Deputy Attorney General David W. Ogden stated that "prosecutors should be aware that [U.S. Attorney's Manual] Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*."[80] Neither the Ogden Memo nor the U.S. Attorney's Manual (USAM), however, currently includes any citation to ABA Formal Opinion 09-454 or any ABA rules or standards.[81] Despite the broad disclosure obligation referenced in the Ogden Memo, disclosure of all favorable information, regardless of materiality, is not the policy of the Department.[82]

Rather, USAM § 9-5.001(A) states that the "policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair."[83] Then, citing Supreme Court case law, USAM 9-5.001(B) sets forth a prosecutorial disclosure obligation that focuses primarily on the concept of "materiality[,]"[84] adding that "ordinarily[] evidence that would not be admissible at trial need not be disclosed."[85]

What is clear is that the *Brady* doctrine alone, as it has been circumscribed by the courts, cannot be relied upon to ensure a defendant's access to favorable information.

Because the Supreme Court takes somewhat contrary views regarding a prosecutor's disclosure obligations, the message to prosecutors and to courts has been confused. Prosecutors have been told they are constitutionally bound to disclose only material favorable information yet ethically bound to do more. Under a strict reading of *Brady* and its progeny, however, prosecutors can disclose very little without risk of upsetting the conviction. The lack of clarity from the Court is evident in the lack of consistency in the practices of prosecutors and in the different ways in which lower courts resolve questions of disclosure.

In addition, the difficulties inherent in the application of *Brady*'s materiality standard have caused some courts to conclude that the standard is simply unworkable in the trial context. For example, Federal District Court Judge Paul L. Friedman noted that the pre-trial judgment of materiality is "speculative" and dependent on questions that are "unknown or unknowable."[86] What is clear is that the *Brady* doctrine alone, as it has been circumscribed by the courts, cannot be relied upon to ensure a defendant's access to favorable information.

III. STUDY PURPOSE AND METHODOLOGY SUMMARY[87]

The primary objective of this study was to review a sufficient number of judicial decisions in order to provide a fair assessment of the quality and consistency of judicial review by courts deciding claims under *Brady v. Maryland*. As an initial matter, the **Research Team**[88] limited the universe of decisions to those made in federal courts over a defined five-year time period from August 2007 to August 2012.[89] From that group, the Research Team identified over 5,000 decisions in which *"Brady v. Maryland"* appeared in the decision text and pulled a random selection of those decisions to arrive at the Study Sample of 1,497 decisions for closer reading, analysis, and coding.[90]

The Research Team then developed a detailed analytical methodology to provide quantitative answers to the following three questions:

1. Are courts consistent in the use and application of the materiality standard when deciding *Brady* claims?

2. What other issues or factors, if any, influence or underlie courts' resolutions of *Brady* claims?

3. To what extent is favorable information being withheld from the defense?

To ensure consistency, the Research Team created an extensive **Guidance Document**[91] with step-by-step instructions on how to analyze and code each decision within the Study Sample. Only the decisions contained within the Study Sample received analysis and coding, *i.e.,* the Study did not analyze any subsequent treatment of the decisions by any reviewing courts.

Before discussing the study's findings, it is important to acknowledge the limitations of the study's methodology. First, this research barely scratches the surface of *Brady* practice and jurisprudence. *Brady* violations are by definition hidden and this study examines only those decisions in which a petitioner/appellant raised a violation claim. Second, this study is based on information gathered from post-conviction opinions available on Westlaw and, as such, the Study Sample almost exclusively reflects cases in which the defendant exercised his right to a trial. The study therefore does not touch on the majority of criminal prosecutions resolved without trial, which make up more than 90 percent of all criminal cases,[92] or those cases in which the undisclosed information is yet to be discovered. Further, the troubling findings discussed in this report are all the more serious when considered in the context of this study's limitations — the Study Sample includes less than one-third of the federal court decisions citing *Brady* during the selected five-year time period that are available on Westlaw, and it does not include *Brady* claims that were abandoned before reaching federal court.

IV. PROFILE OF THE STUDY SAMPLE

The Study Sample included 1,497 decisions issued by federal courts over a five-year time period, from Aug. 1, 2007 to July 31, 2012.

As illustrated in Figure One, 620 decisions or 41 percent of the Study Sample resolve a *Brady* claim on the **merits***, and the remaining 877 decisions or 59 percent of the Study Sample do not resolve a *Brady* claim on the merits, *i.e.*, a **non-merits decision**.[93] ***See* Figure 1**.

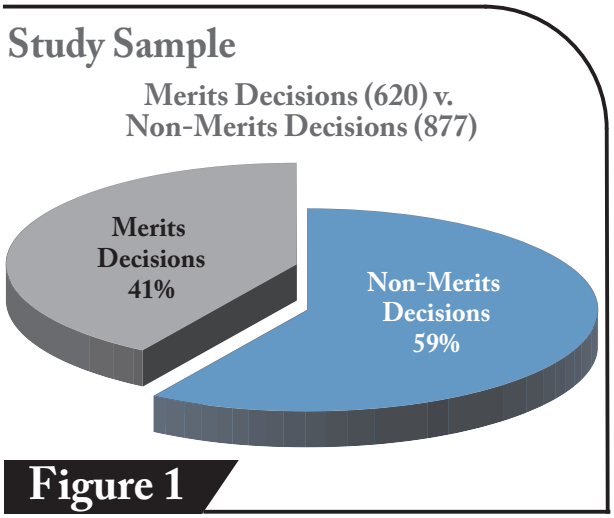


Figure 1

Of the 620 decisions, 433 are in cases that originated in a state court and the remaining 187 are in cases that arose from a federal court prosecution. As Figure Two reflects, this is a two-to-one ratio of state to federal prosecutions. ***See* Figure 2**.

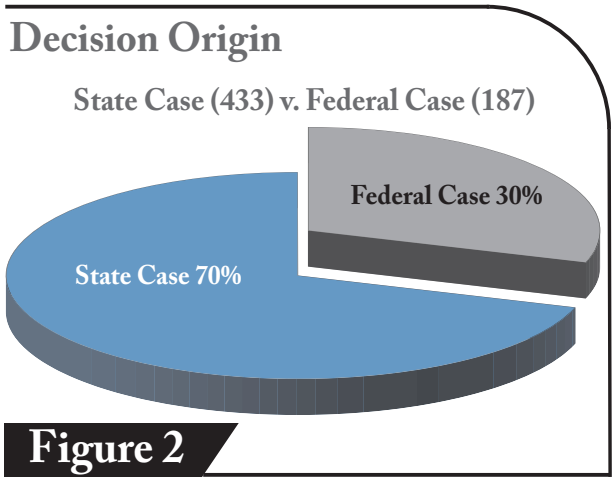


Figure 2

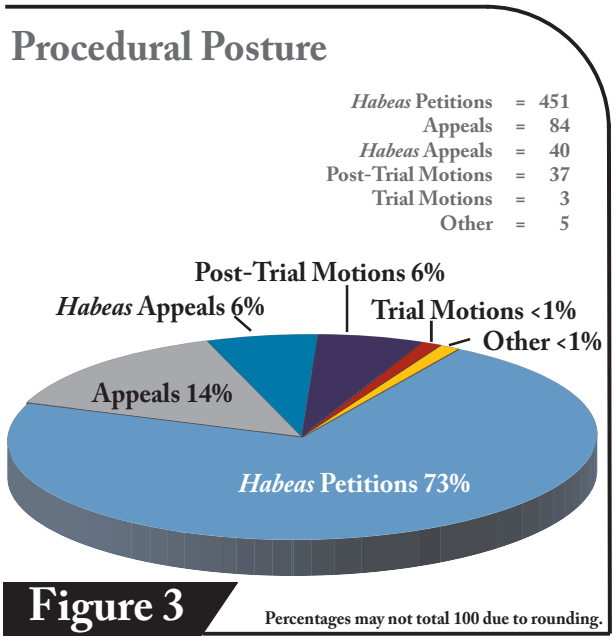


Figure 3 Percentages may not total 100 due to rounding.

Although these decisions present a variety of procedural postures, nearly three-fourths are petitions for a writ of ***habeas corpus***.[94] Figure Three illustrates the decisions broken down by procedural posture.[95] ***See* Figure 3**.

*As used in this report, the term "decisions" refers only to the 620 Study Sample decisions that resolve a *Brady* claim on the merits.

Figure Four demonstrates that more of the decisions involve a petitioner appearing *pro se* than those acting with legal representation. Specifically, 285 decisions involve a petitioner represented by counsel and 335 decisions involve a petitioner appearing *pro se*.[96] ***See* Figure 4**.

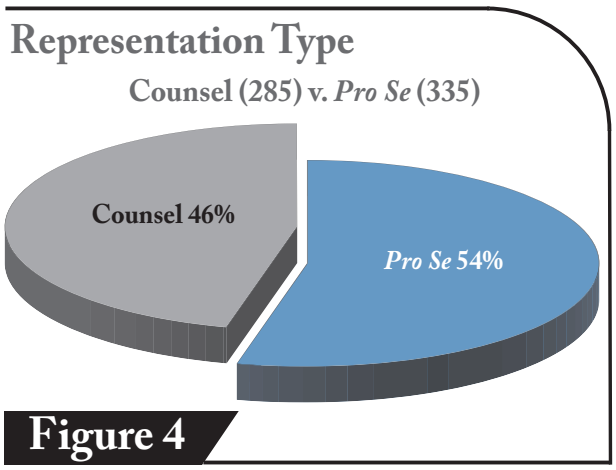
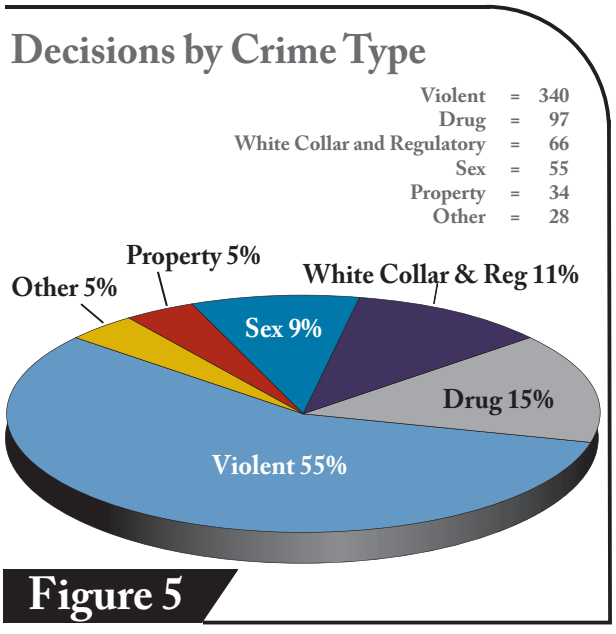
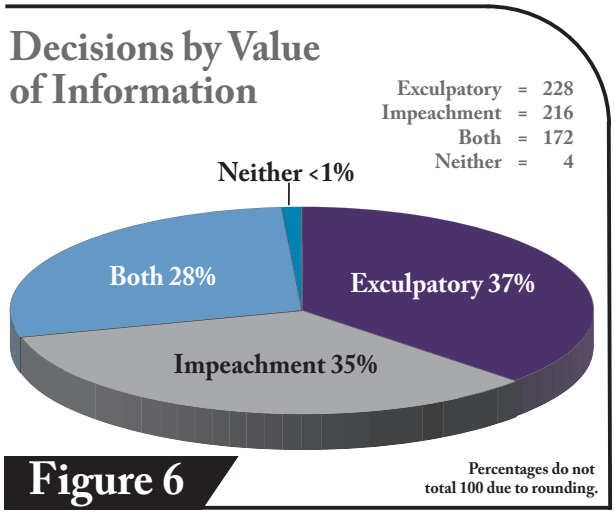


Figure Five shows the breakdown of decisions by crime type, with violent crimes constituting over 50 percent of the 620 decisions. ***See* Figure 5**.



The Research Team also identified 59 decisions in which the petitioner raising the *Brady* claim was facing the death penalty. Thus, in nearly 10 percent of the decisions, the court assessing the *Brady* claim did so with knowledge that denying the claim and upholding the conviction could result in the petitioner's execution.

As Figure Six demonstrates, the number of decisions involving impeachment information is nearly equal to the number involving exculpatory information. Approximately 28 percent of the decisions involve both impeachment and exculpatory information. ***See* Figure 6**.



The information at issue in the decisions came in a variety of forms, most frequently as documentary information or **statements**. Figure Seven illustrates all 620 decisions broken down by information type.[97] In order to account for the many decisions that involve multiple types of information, Figure Seven lumps all such decisions into one category labeled "multiple." ***See* Figure 7**.

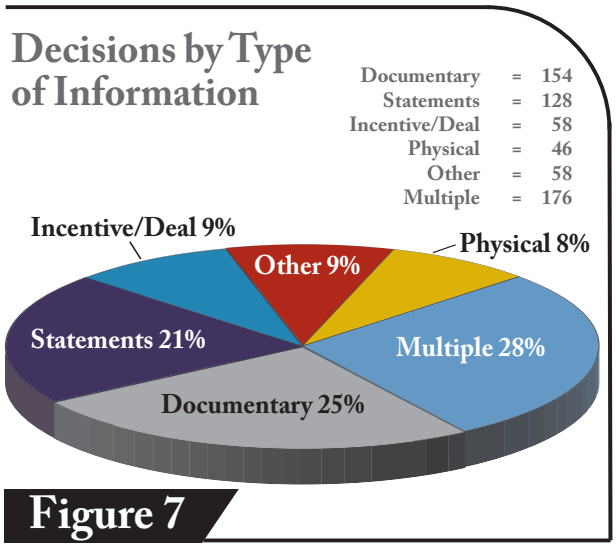


Figure 7

To gain a different perspective on the prevalence of each information type in the Study Sample, the Research Team distributed each instance of a particular type of information in the "multiple" category to the total count for that type of information without regard to decision double counting. By counting the total instances of a particular type of information, the prevalence of that one type, within all the decisions, can be compared to the prevalence of every other type of information within all the decisions. Figure Eight sets forth this comparison and reveals that nearly half the decisions contain documentary information and approximately two-fifths contain statements.[98] ***See* Figure 8**.

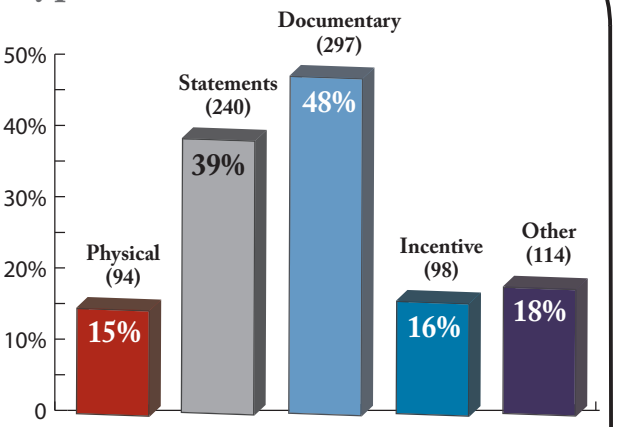


Figure 8

Each of the 620 decisions resolves one or more *Brady* claims in one of four possible ways. In resolving the claim, the court may have found (1) the government did **not withhold** the information at issue, (2) the information at issue was **not favorable**, (3) the information at issue was **not material**, or (4) the government violated *Brady* by withholding favorable, material information. Figure Nine shows the breakdown of the 620 decisions by *Brady* claim resolution. ***See* Figure 9**.

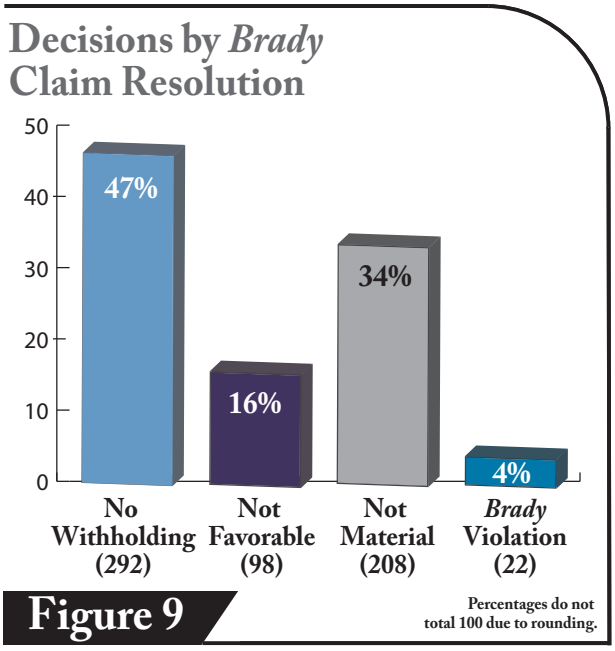


Figure 9

In 292 decisions, the court rejected post-conviction relief on the grounds that the government had not withheld the information at issue. Another 98 decisions rejected the *Brady* claim when the court concluded the information at issue was not favorable to the defendant. In 208 decisions, more than one-third of all the decisions, the petitioner failed to obtain relief because the court deemed the information at issue not material. And, in the 22 remaining decisions, the court found that the government violated *Brady* by withholding favorable, material information.[100] Thus, as illustrated above, the court ruled in favor of the defense in less than four percent of the decisions and sided

with the government over 96 percent of the time, with approximately one-third of those decisions turning on the question of materiality.

The Research Team also identified 145 decisions in which the government failed to disclose favorable information.[101] Notably, in 86 percent of these decisions, the court concluded that the **undisclosed favorable information**[102] was not material and rejected the *Brady* claim; only 14 percent of these decisions resulted in a finding that the undisclosed favorable information was material and, therefore, a violation of *Brady*. Figure 10 illustrates this significant imbalance — nearly nine out of 10 decisions involving undisclosed favorable information rejected the *Brady* claim and ruled in favor of the government. ***See* Figure 10**.

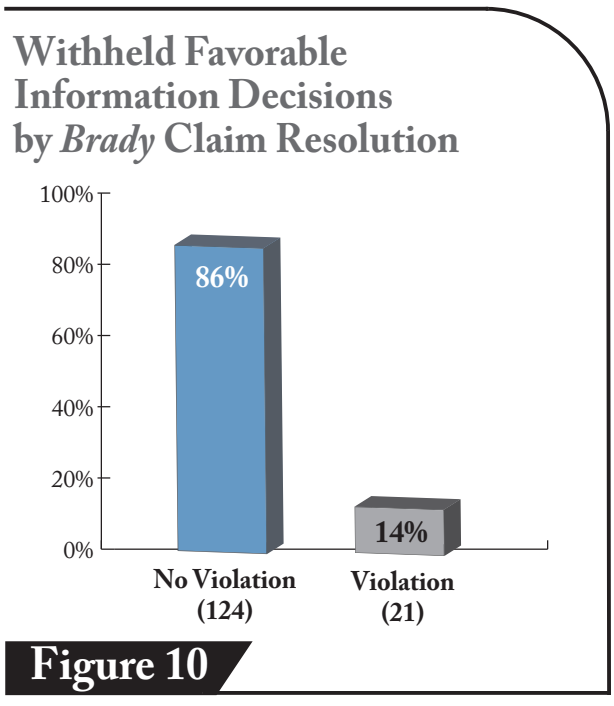


Figure 10

The Research Team also identified 65 decisions in which the government did disclose the favorable information but did so in an untimely manner. Of these 65 **late disclosure decisions**, the court determined that the favorable information was not material, or that the late disclosure was not materially prejudicial, in all but one. Adding late disclosure decisions to those decisions involving undisclosed favorable information reveals an even greater imbalance. As Figure 11 demonstrates, the courts ruled in favor of the government in 90 percent of decisions involving **withheld favorable information** — *i.e.*, when the government disclosed favorable information late or never disclosed it at all, it prevailed in nine out of 10 decisions. ***See* Figure 11**.

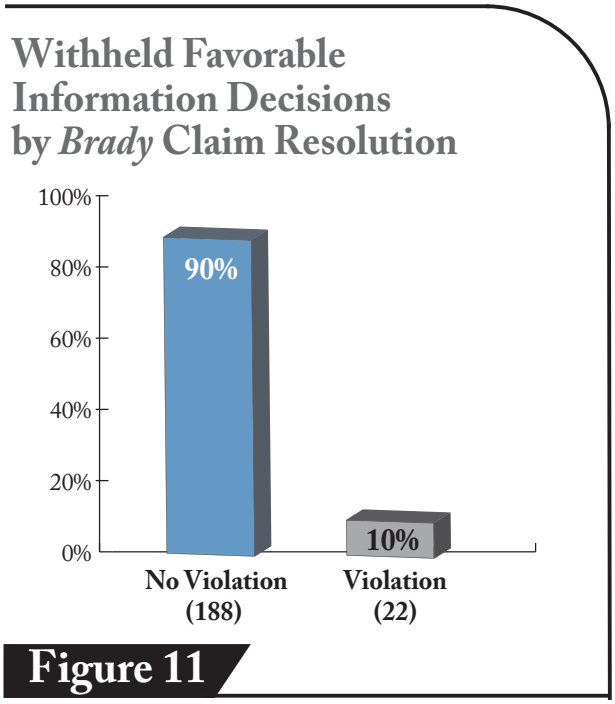


Figure 11

V. THE MATERIALITY STANDARD AS DEFINED AND APPLIED BY THE BENCH

A primary objective of this study was to analyze the articulation and application of the materiality standard by courts resolving *Brady* claims. In support of this objective, the Research Team sought to ascertain all articulations of the materiality standard set forth by courts subsequent to the *Brady* decision. Then, for each decision in the Study Sample, the researchers identified which of those articulations, if any, that particular court used when making its materiality determination. Of the decisions in the Study Sample that included a materiality determination, researchers found that nearly 87 percent articulated and applied either the *Bagley* standard, the *Kyles* standard, or both.[103] About five percent of the study's decisions that included a materiality determination applied an alternative articulation and the remaining eight percent did not include any materiality standard articulation.

Regardless of how the materiality standard is articulated, courts apply the standard in an arbitrary and unpredictable manner.

The Research Team found that, regardless of how the materiality standard is articulated, courts apply the standard in an arbitrary and unpredictable manner. In other words, the researchers found no relationship between the particular articulation of the standard and the decision outcome. Even when evaluating the same information, in similar factual contexts, and applying the same articulated standard, different courts may ultimately resolve the *Brady* claim differently. In addition, the data demonstrates that materiality determinations significantly favor the government and suggests that courts may take a results-oriented approach to the application of the materiality standard.

A. Decision Comparisons — Arbitrary Application of the Materiality Standard

The decision comparisons that follow demonstrate the flawed nature of the materiality standard. Even when courts articulate it consistently, the standard may be applied in an arbitrary and subjective manner. As shown below, the results of that application can be inconsistent.

MATERIAL OR NOT MATERIAL?

Key Government Witness Investigated for Sexual Misconduct with Minors and Attempt to Suborn Perjury

Factual Similarities: Peter Kott and Victor Kohring were both former members of the Alaska State House of Representatives when they were convicted of three federal public corruption offenses — conspiracy, extortion, and bribery.[104] The convictions stemmed from a larger public corruption conspiracy orchestrated by Bill Allen, the chairman of a large oil industry company. Kott and Kohring were alleged to have taken bribes from Allen in exchange for legislative action. Allen struck a deal with the government in exchange for his testimony against Kott, Kohring, and others implicated in the conspiracy, as well as former U.S. Senator Ted Stevens.[105]

Undisclosed Information: The prosecutors failed to disclose several thousand pages of documents, including information that Allen had been, or was still being, investigated for sexual misconduct with minors and had attempted to conceal that behavior by soliciting perjury from the minors and making them unavailable for trial.

United States v. Peter Kott

U.S. District Court for the District of Alaska

Peter Kott — Information Is Not Material

"Kott had ample opportunity to show, and at trial did show, Allen's bias based on the substantial value of Allen's cooperation, … a consideration which made the jury well aware of the powerful incentive Allen had to shade his testimony in favor of the government." This evidence "may be described as needlessly cumulative on the question of Allen's incentive to help the prosecution."

United States v. Victor Kohring

U.S. Court of Appeals for the Ninth Circuit

Victor Kohring — Information Is Material

"The fact that Allen might have had a motive to testify [] in order to gain leniency as to his corruption charges does not mean that evidence of a different bias of motive would be cumulative." This evidence "would have shed light on the magnitude of Allen's incentive to cooperate" and "would have revealed that he had much more at stake than was already known to the jury."

Therefore, "[t]his evidence would have been excluded under Rule 403."

Regarding cross-examination on the topic, "[i]t is known that Allen had previously denied the conduct, so he surely would have repeated the denial. The result is that this line of inquiry would not be of significant assistance[.]"

"[A]dmission of the evidence creates a serious danger of confusing the issues which the jury actually needs to decide — whether Kott is guilty of the crimes charged, not whether Allen is guilty of sex crimes."

"In view of this court, the evidence regarding the alleged subornation of perjury is not material in the context of all the evidence, and the failure to disclose it did not prejudice Kott."

U.S. District Court for District of Alaska:
No *Brady* violation. Conviction upheld.

Therefore, this evidence "does not run afoul of Rule 403[.]"

Regarding cross-examination on the topic, "even if Allen would have denied the allegations, the jury would have been able to observe his demeanor when he answered the questions, which might have been telling."

"The alleged misconduct would have added an entirely new dimension to the jury's assessment of Allen. Allen was the prosecution's star witness."

"[H]ad the evidence of Allen's past been disclosed, there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment regarding Allen's testimony against Kohring."

Court of Appeals for the Ninth Circuit:
***Brady* violation. Conviction reversed.**

MATERIAL OR NOT MATERIAL?

Late Disclosure of Potentially Exculpatory Physical Evidence

Factual Similarities: During their respective jury trials, Michael A. Willis and Wayne D. McDuffie each pursued the same defense theory — that he had been framed.[106] Specifically, each argued that he was the victim of a police conspiracy because he refused to cooperate with other ongoing murder investigations. The prosecution in both cases possessed, but failed to disclose until after the trial was well underway, physical evidence that could have supported the defense theory and may have proven exculpatory upon further investigation. The untimely disclosure of this evidence not only foreclosed such investigation, but prevented Willis and McDuffie from presenting their defense theory in a coherent manner.

Different Crimes: The charges against Michael Alan Willis were violent in nature, first degree felony murder being the most serious count of which he was convicted, whereas Wayne D. McDuffie was convicted of two drug charges (manufacture and possession with intent to distribute cocaine base).

Undisclosed Evidence: For Willis, the government withheld a Michigan State Police laboratory report stating that the palm print recovered from the crime scene was suitable for comparison but that no match had been identified and that the lab requested, but did not receive, a palm print of Willis for comparison. Following the trial, Willis learned that the Michigan State Police records contained a copy of his palm print that could have been compared to the palm print recovered from the crime scene. In the case of McDuffie, the government withheld the presence of a fingerprint belonging to Detective Barrington, a key witness for the government, on a drug scale recovered from McDuffie's apartment during a planned search pursuant to a warrant.

Michael A. Willis v. Warden Carol Howes

U.S. District Court for the Eastern District of Michigan

Michael Alan Willis — Late Disclosure Of Evidence Is Not Material

"[The] report was not 'suppressed' within the meaning of *Brady* … [because it] was disclosed during Officer Calabrese's testimony and counsel was able to cross-examine Calabrese regarding his earlier incorrect testimony about the contents of the report."

"[I]nformation that the state police in fact had petitioner's palm print on file would not have impeached Calabrese or damaged any of his other testimony, but merely would have impeached the laboratory report."

United States v. Wayne D. McDuffie

U.S. Court of Appeals for the Ninth Circuit

Wayne D. McDuffie — Late Disclosure Of Evidence Is Material

"Because the disclosure of this evidence near the end of its own case in chief prevented McDuffie from presenting his theory of the case in a coherent manner, the government effectively suppressed it."

"This evidence is favorable to McDuffie and potentially impeaching of Barrington."

"[T]here is not a reasonable probability that the result of the proceeding would have been different had the existence of petitioner's palm print file been disclosed at trial. The existence of the palm print file had no substantive exculpatory value, and its only value would have been in impeaching Officer Calabrese's testimony regarding the reason why the recovered palm print was not compared with petitioner's palm print."

"[The] view that '[t]he palmprint record was *Brady* evidence because at a minimum Willis could have used it to impeach the credibility of the investigating officer who subsequently denied that the record existed' … is simply incorrect."

Court discredits defense theory of the case, relies on government's case …

"There was extensive eyewitness testimony[] and defense counsel strove mightily to impeach or otherwise call into question that testimony, and at times succeeded in doing so. Counsel focused extensively, particularly in his cross-examination of Officer Calabrese, on the utter lack of physical evidence tying [Willis] to the crime. [Willis] presented a vigorous alibi and misidentification defense, calling witnesses who testified both as to his whereabouts on the day and time of the crime and his appearance at that time, which did not match the descriptions given by the witnesses. ... Despite this evidence, and despite [Willis'] own alibi evidence, the jury nonetheless credited the prosecution witnesses' in-court identifications[.]"

"Given the extensive impeachment of the prosecution case already before the jury, it is highly doubtful that one additional point of impeachment, on a collateral matter which was not actually within the testifying witness's personal knowledge, would have affected the jury's verdict. Much less is there a "reasonable probability" that the result of petitioner's trial would have been different had it been disclosed that the State Police in fact had a copy of petitioner's palm print on file."

U.S. District Court for the Eastern District of Michigan:
No *Brady* violation. Conviction upheld.

"[H]ad McDuffie been able to present a coherent theory of evidence tampering, there is a reasonable probability that the jury would have discredited Barrington and reached a different conclusion in the case."

"McDuffie was unable to retain his own experts in forensics or police procedure, or to do any pretrial discovery into the [] chain of custody."

"This evidence supported McDuffie's theory that Barrington sought to frame him in order to pressure him to cooperate."

Court relies on defense theory of the case, does not consider government's case…

"[H]ad McDuffie been able to present a coherent theory of evidence tampering, there is a reasonable probability that the jury would have discredited Barrington and reached a different conclusion in the case."

"The government's failure to disclose this evidence was [] prejudicial, again because it prevented McDuffie from presenting a coherent version of his theory of the case."

"The prejudicial effect of the government's late disclosure is therefore 'sufficient to undermine confidence in the outcome of the trial.'"

U.S. Court of Appeals for the Ninth Circuit:
***Brady* violation. Conviction reversed.**

B. Materiality Analysis — An Arbitrary and Unpredictable Approach

The disparity in the way courts resolve similar *Brady* claims, as demonstrated in the preceding decision examples, is a consequence of the highly subjective nature of assessing the relevance and impact of information and the inherent vagaries in the nature of the *Brady* doctrine itself. In that regard, the case of Senator Ted Stevens discussed in the introduction is particularly illustrative when considered alongside the two related court decisions, *United States v. Kohring*[107] and *United States v. Kott*,[108] that are compared above. Stevens, Kohring, and Kott were all Alaska elected officials facing charges of political corruption, and in all three cases the government withheld substantial information pertaining to its star witness Bill Allen. As between Kohring and Kott, despite reviewing nearly identical *Brady* claims, the U.S. District Court for Alaska and the Ninth Circuit Court of Appeals reached different results.[109]

In *Kohring* and *Kott*, different courts dealing with identical charges, an identical witness, and identical information in the same context, reached different conclusions.

In *Stevens*, the U.S. District Court for the District of Columbia vacated the conviction upon the request of the government when the *Brady* violations came to light.[110] At the same time, Kohring and Kott were pursuing appellate challenges to their respective convictions and moved to order the government to disclose all information "favorable to the accused."[111] In response, the government moved to remand both cases to the Alaska District Court and then, for the first time, disclosed literally thousands of pages of documents, including multiple pieces of information that directly impeached star witness Bill Allen and information that had not been revealed in the Stevens proceedings.[112] Arguing that the government's conduct violated *Brady*, Kohring and Kott moved for a dismissal of their convictions or a new trial. The district court rejected their claims, declaring that the withheld information was not material, forcing both defendants to pursue another appeal. In both cases, however, the Ninth Circuit disagreed — it ultimately held the undisclosed information was in fact material and therefore a violation of *Brady*. It was not until the Ninth Circuit vacated their convictions that Kohring and Kott were finally afforded a remedy.[113] For Kott, it took nearly a year from the *Stevens* dismissal to secure this relief and, for Kohring, the wait was over two years.[114]

The inclusion of the Alaska District Court's *Kott* decision and the Ninth Circuit Court's *Kohring* decision in the Study Sample is particularly illustrative of the arbitrary manner in which the materiality standard can be applied.[115] In *Kohring* and *Kott*, different courts dealing with identical charges, an identical witness, and identical information in the same context, reached different conclusions when applying the same legal standard. Further, the interplay between the government's decision to dismiss the conviction in the *Stevens* case and its decision to defend the convictions of Kott and Kohring, even after more withheld information came to light, illustrates the truly disparate treatment defendants can receive when the government withholds information from the defense.

These decision comparisons put a human face on the flawed nature of the materiality standard. The data, however, illustrates another problem — when a *Brady* claim is resolved on the question of materiality, courts overwhelmingly favor the government. Of the 620 decisions, courts found the withheld information to be material in only 22 — *i.e.*, less than four percent of the decisions were resolved with a court finding that *Brady* was violated.

Acknowledging that not all the Study Sample decisions involved the withholding of favorable information, the Research Team individually evaluated each of the 620 decisions to identify only those involving favorable information that was not disclosed.[116] The Research Team found that 145 decisions involved undisclosed favorable information and, notably, only 21 of those decisions (14 percent) resulted in a court finding the government violated *Brady*. Conversely, of the 145 undisclosed **favorable information decisions**, the court found that the information was not material in 124 decisions — *i.e.*, when the *Brady* claim was resolved by application of the materiality standard, the government won 86 percent of the time (***see* Figure 10**). When those decisions involving the late disclosure of favorable information are included, this number jumps to 210 decisions and, of those 210 decisions, the court found the information not material in 188, which is 90 percent of the time (***see* Figure 11**).[117]

While the arbitrary application of the materiality standard is problematic in itself, the frequency with which courts conclude information is not material overwhelmingly favors the government and creates an impression of bias.

C. Conclusions on the Materiality Standard

Although *Brady* violations are often couched in terms that place criticism on the shoulders of the prosecutors, this is not a complete picture of the problem. When materiality is the norm for disclosure, earnest and ethical prosecutors are asked to struggle with a doctrine that in many ways is unworkable. Justice Thurgood Marshall characterized the materiality requirement as "a pretrial standard that virtually defies definition."[118] For these reasons, while recognizing the importance of strengthening and enforcing ethical rules, experts are now turning their attention to the *Brady* doctrine itself, specifically reforms that prohibit the use of the materiality requirement to limit disclosure, rather than reinforcing ethical rules or disciplining prosecutors for mistakes or failures.[119]

The prosecutor was so convinced of the defendant's guilt that DNA tests to the contrary were, in his eyes, not material. The *Brady* rule is no match for this sort of blinding conviction.

Brady articulates a post-trial standard used by reviewing courts when assessing the prejudice of non-disclosure in the context of due process demands. This may make sense in the post-trial context, but use of *Brady* as the pre-trial standard for determining disclosure obligations is fundamentally flawed. It is flawed because it asks a prosecutor to assess the materiality of information in relation to the "whole case" before there is a "whole case" to measure the information against.[120] It is impossible to weigh the material value of information in a case before it is tried, before the issues are known, and without the

benefit of the defense theory. The job of correctly assessing materiality prospectively, when materiality can only accurately be measured retrospectively, is guesswork under the best of circumstances. According to the *Agurs* Court, "[t]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete."[121]

Further, the problem is compounded by the cognitive biases inherent in human nature. In the prosecutor's dual roles of advocate and minister of justice, with the difficult job of deciding what information to disclose to her opponent, cognitive bias takes on exceptional importance. Confirmation bias is a type of cognitive bias that signifies the tendency to seek or interpret information in ways that support existing beliefs, expectations, or hypotheses.[122]

Judges are under considerable pressure from the system to uphold convictions and are limited in many of the same ways as prosecutors when attempting to measure materiality.

A prosecutor reviewing a case file for the first time is testing the hypothesis that the defendant is guilty and is looking for information to confirm that expectation.[123] Because the police or agents have "solved" the case, there will undoubtedly be information in the file to support the guilt hypothesis. Thus, as a result of confirmation bias, the prosecutor that expects to become convinced of guilt then engages in selective information processing, accepting as true information that is consistent with guilt and discounting conflicting information as unreliable or unimportant. Information discounted as unpersuasive, unreliable, or unimportant will rarely rise to the level of "material" in the mind of that prosecutor.

Common examples of this phenomenon can also be seen when requests are made for post-trial DNA testing in cases in which prosecutors start out convinced of the defendant's guilt. This is illustrated in the case of Ronald Williamson, the subject of John Grisham's first book of non-fiction. Grisham writes: "Bill Peterson [the prosecutor] liked the idea of DNA testing. He had never wavered in his belief that Williamson was the killer, and now it could be proved with real science."[124] But after the DNA tests exonerated Williamson, the prosecutor's opinion was not affected. Grisham wrote: "Peterson was still convinced Ron Williamson had raped and murdered Debbie Carter, and his evidence had not changed. Forget the DNA."[125] The prosecutor was so convinced of the defendant's guilt that DNA tests to the contrary were, in his eyes, not material. The *Brady* rule is no match for this sort of blinding conviction.

Even for the most ethical prosecutor, application of the materiality standard is not done in a vacuum and rarely considers the defense perspective — the application is unfairly influenced by the prosecutor's **theory of the case**, even if inadvertent. In light of what is a pliable materiality standard, a prosecutor, with a singular drive to win his case, might be inclined to conclude that information is not material.

Prosecutors are not only zealous advocates but also ministers of justice responsible for ensuring the fairness of a judicial process.

> [T]he dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate.

Material Indifference:

> He is a trained attorney who must aggressively seek convictions ... at the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence.[126]

And for those prosecutors practicing close to the ethical line, the nature of the materiality standard provides an opportunity for engaging in a kind of gamesmanship that is wholly inconsistent with the spirit of *Brady* and, quite possibly, in violation of *Brady*'s mandate.[127]

Unless the jurisdiction has adopted open file discovery, the prosecution's file is not available to the defendant or to the court absent the prosecutor's permission.[128] The justice system therefore depends on the prosecutor to recognize the significance of the information and to willingly disclose it. This makes little sense in cases in which the decision to disclose jeopardizes the prosecution's case.[129] The problem is exacerbated since such decisions are almost never subject to review.

Judges face similar challenges and are just as susceptible to confirmation bias as anyone else. They are under considerable pressure from the system to uphold convictions and are limited in many of the same ways as prosecutors when attempting to measure materiality. As the Supreme Court acknowledged, "The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures ... to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor."[130] The reviewing court has a record of what was presented at trial, but rarely has insight into that which is not in the record — defense theories and strategic decisions based on what was disclosed, additional information that could have been discovered, what influenced the jury's decision, and how the disclosure might have tipped the scales.

This Study not only provides quantitative evidence that the materiality standard favors the government, but it demonstrates how such an approach is arbitrary, and, therefore, unjust.

Despite these uncertainties, judges are left to make these decisions in a vacuum and, when the decision turns on the question of materiality, as this Study demonstrates, the defense rarely wins. This Study not only provides quantitative evidence that the materiality standard favors the government, but it demonstrates how such an approach is arbitrary, and, therefore, unjust.

VI. RECURRING ISSUES AND FACTORS AFFECTING *BRADY* CLAIM RESOLUTION

Analysis of the Study Sample reveals some recurring issues in the decisions and certain factors that tend to influence courts' resolution of *Brady* claims. First, a significant number of the decisions involved the late disclosure of favorable information.[131] Second, the Research Team identified a group of decisions in which the court denied the *Brady* claim because "the defense could have obtained the evidence on its own with reasonable diligence,"[132] sometimes in instances in which defendants had little ability to access the information. Third, in a large portion of the decisions — nearly one of every six — the *Brady* claim involved information of an incentive or deal for a witness to testify or alleged facts suggesting the existence of a deal for a witness to testify.

Of the 65 late disclosure decisions, nearly all involved a disclosure taking place after the start of trial and, in all but one, the courts concluded the timing was not materially prejudicial.

A. Late Disclosure of Favorable Information

The Study Sample includes 65 late disclosure decisions.[133] A late disclosure decision is a decision in which the accused asserts a *Brady* claim based on the untimely disclosure of favorable information by the prosecutor. The timing of disclosure in these decisions ranges from shortly before trial to long after conviction, with the large majority taking place during trial. Specifically, the Research Team identified 12 decisions involving late disclosure pre-trial, 53 decisions where the favorable information was disclosed during trial, and three decisions where the favorable information was disclosed after trial.[134] Figure 12 shows the timing of the disclosure — pre-trial, during trial, and after trial — for decisions involving late disclosure of favorable information. ***See* Figure 12**.

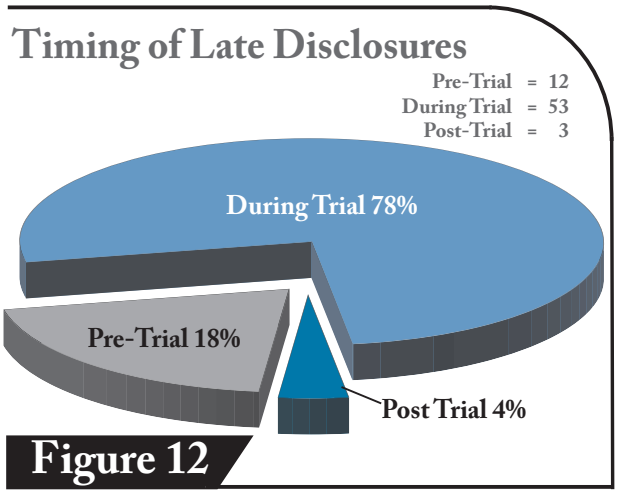


Figure 12

Material Indifference:

The rules that govern the timing of favorable information disclosures vary, but any such disclosure that takes place after the start of trial is untimely under most rules. Federal districts differ widely, but all require disclosure of favorable information before trial.[135] There is also disparity among state disclosure requirements, ranging from 10 days after arraignment to not later than seven days before trial.[136] In addition, as the Supreme Court recognized in *Cone v. Bell*,[137] a prosecutor's disclosure obligation "may arise more broadly under a prosecutor's ethical or statutory obligations" than under *Brady*. The Court cited the ABA Criminal Justice Standards, which encourage prosecutors to disclose favorable information at the "earliest feasible opportunity,"[138] as well as ABA Model Rule of Professional Conduct 3.8(d).[139] The Model Rule encourages "timely disclosure," clarified in ABA Formal Opinion 09-454 to mean "as soon as reasonably practical" after the prosecutor becomes aware of the information.[140]

Of the 65 late disclosure decisions, nearly all involved a disclosure taking place after the start of trial. In all but one of these 65 decisions, the courts concluded that the defendant was not materially prejudiced by the timing of the disclosure. By excusing this behavior, the judiciary undermines the clear rules intended to protect a defendant's access to timely disclosure of favorable information.[141]

1. Late Disclosure Sample Decisions

Disclosing favorable information late can render that information useless, either by preventing the defense from following up on potential leads or by interfering with the ability to develop a cogent defense theory or an alternate theory of a case. The *Jackson v. Senkowski* decision illustrates these precise issues.[142]

In *Jackson*, the favorable information was disclosed three and a half years after it was in the prosecutor's control — too late to be of any value to the defense and having the same effect had it never been disclosed. Just a couple days after a multiple homicide, an eyewitness made two separate statements to the police and prosecutor, respectively, supporting Jackson's defense theory.[143] Specifically, the eyewitness stated unequivocally that Jackson was in the stairwell, not inside the apartment with the victims, when the fatal shots were fired. The statements also included leads to other possible perpetrators of the crimes. The prosecution withheld these two favorable statements for three and a half years, disclosing them just six months before trial. By then, the witness's "memory of the incident had diminished to the point that he could no longer recollect any of the events at issue."[144]

There is no *Brady* violation as long as *Brady* material is disclosed in time for "its effective use at trial," a phrase that is interpreted in such a way as to give considerable deference to the prosecution.

As a result of the prosecution's late disclosure, Jackson lost the ability to present eyewitness testimony that supported his version of the facts and to pursue other leads. When affirming Jackson's conviction, the court acknowledged the favorable nature of these two statements, but held that "the trial judge effectively remedied any prejudice stemming from the prosecution's *Brady* violation" when it severed Jackson's trial from his co-defendants, allowed the admission of the two favorable statements into evidence, and instructed the jury that they could draw an adverse inference from the prosecution's failure to disclose.[145] Jackson was convicted of multiple counts and sentenced to 25 years to life in prison.[146]

In another decision, *Chinn v. Warden of Mansfield Correctional Institution*, the disclosure of favorable information during the trial prevented the defense from following up on potential leads.[147] At trial, during the cross-examination of a key government witness, the defense learned for the first time that the witness had seen a third person at the crime scene just before the crime occurred. It was also revealed that the witness made a statement to this effect to both the police and the prosecutor directly, but it was never disclosed to the defense. Although defense counsel "was afforded the opportunity to fully cross-examine" the witness on this information, the timing of this disclosure precluded any additional investigation.[148]

Late disclosure handicaps pre-trial preparation by a defendant's legal team and can have the same profoundly unfair consequences as never disclosing the information at all.

Chinn argued that the delayed disclosure of this favorable information "effectively deprived him and his counsel of the opportunity to pursue an investigation[,] … to explore alternative [defense theories], to fully present inconsistencies in the testimony of the State's witnesses, and to show weaknesses in the State's evidence."[149] If the defense had these opportunities, Chinn asserted, then "there was a reasonable probability that the result of the proceeding would have been different."[150] Rejecting the notion that the late disclosure caused any prejudice, the court stated: "It is purely speculative that defense counsel would have been able to track down this unidentified third person and what he would have said."[151] The court concluded the prosecution did not violate *Brady* and upheld Chinn's conviction and death sentence.

These decisions demonstrate that the late disclosure of favorable information — in some cases years after the prosecutor had control of the information — has the same profoundly unfair consequences as never disclosing the information at all.

2. Problems Created by Late Disclosure

Courts generally take the position that there is no *Brady* violation as long as *Brady* material is disclosed in time for "its effective use at trial,"[152] a phrase that is interpreted in such a way as to give considerable deference to the prosecution.[153] Despite the judicial standard for what constitutes an excusable late disclosure,[154] the reality is that late disclosure of favorable information poses serious challenges for the defense.

Late disclosure handicaps pre-trial preparation by a defendant's legal team. Yet prosecutors withheld favorable information until after opening statements in nearly all the late disclosure decisions in this Study Sample. By the time the opening statement is given, the defense in most cases is already committed to its theory of the case. It can be devastating when the prosecution discloses information for the first time after the defense has delivered its opening statement, particularly when the information contradicts an assertion made in the opening or when it is critical information that should have been addressed in the opening. After the defense has delivered the opening statement, it is often too late to take meaningful advantage of new information or follow up on leads that require further investigation.

Importantly, late disclosure also increases the likelihood that an innocent defendant, unaware that favorable information exists, will plead guilty[155] rather than risk conviction of a more serious crime and higher sentence after trial.[156] According to retired U.S. District Court Judge Lee Sarokin,

> Roughly 20 percent of those that have been exonerated confessed to the crimes with which they were charged and convicted. Most of those involved persons who had actually gone to trial, but we have no way of knowing how many there are who merely entered guilty pleas through bargains and never appealed as a result. … [O]nly about 5 percent [of criminal cases] actually go to trial and the balance are resolved by plea agreements.[157]

Judicial tolerance of late disclosure enables prosecutors to pressure a defendant, who would otherwise exercise his right to a trial, to accept a plea agreement.

Sometimes the late disclosure contains information probative of an issue that concerns a witness who has already taken the stand and been excused. Making use of that kind of information requires recalling the witness and interrupting the flow of the trial. Courts sometimes suggest a continuance to give the defense time to pursue the witness for recall or to make use of other newly produced information as a proper remedy for late disclosure,[158] but that too risks disrupting the flow of the case and jurors blaming the defense for prolonging the trial. This can undercut the value of the information and force the defense, after weighing the options, to conclude that recalling the witness is not worth the risk. When defense counsel fails to ask for a continuance, however, some appellate courts interpret this to mean timely disclosure would not have made a difference to the defendant.[159]

3. Late Disclosure Conclusion

Nearly half of the late disclosure decisions in the Study Sample involved statements, suggesting that witness statements are disclosed late more often than other kinds of information.[160] This makes

There is very little excuse for a prosecutor to disclose witness statements late.

sense in the context of federal cases because the **Jencks Act** does not require disclosure of government witness statements until after the witness has testified on direct examination.[161] However, of the late disclosure decisions involving statements, only nine are decisions that originated in federal court where the Jencks Act applies. As illustrated in Figure 13, the majority of the late disclosure decisions involving statements are in decisions that originated in state court where the Jencks Act does not apply and where witness statements are not exempt from rules of discovery that require information be turned over before trial.[162] ***See* Figure 13**.

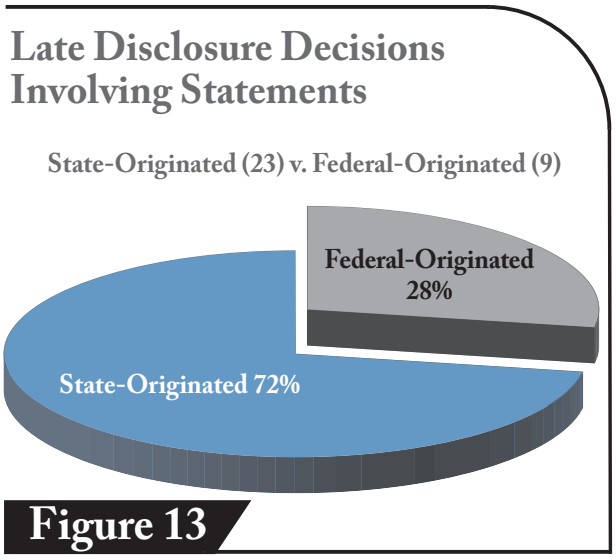


Figure 13

The side-by-side pie charts in Figure 14 illustrate the overrepresentation of statements in late disclosure decisions as compared to statements in all decisions. Of the 620 decisions, approximately 39 percent involved statements. However, of the late disclosure decisions, 49 percent involved statements. ***See* Figure 14**.

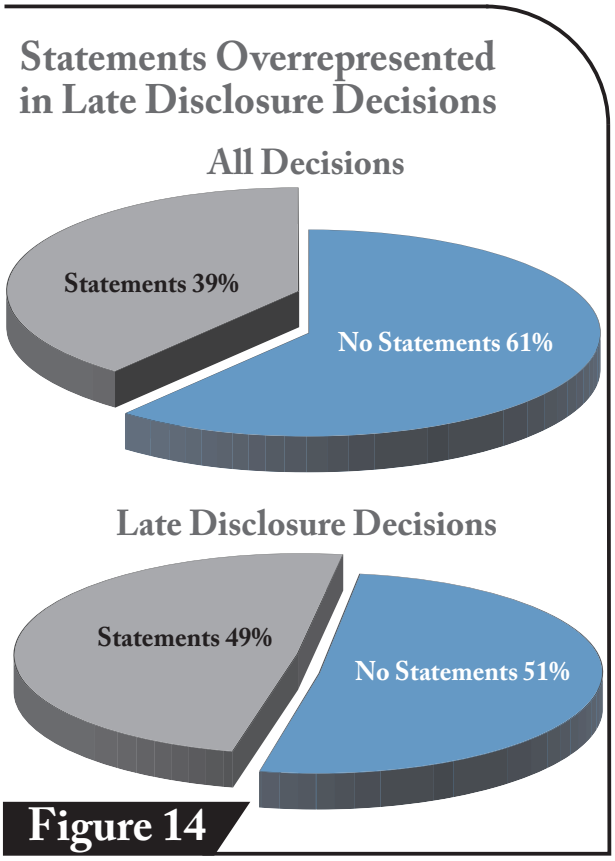


Figure 14

There is very little excuse for a prosecutor to disclose witness statements late. Witness statements are, with rare exception, recorded in the earlier phases of criminal investigations. Prosecutors not only have access to witness statements early in the process, but could not develop their case-in-chief without them. When prosecutors exercise their discretion to delay disclosure of favorable material without justification, they are taking advantage of judicial tolerance of late disclosure and unfairly disadvantaging the defense. Except in unusual circumstances in which disclosure of a witness statement would put the witness in jeopardy, there is no justifiable basis for prosecutors to disclose witness statements late.[163]

Even when the government failed to disclose favorable information in a timely fashion, it still prevailed on the *Brady* claim in over 98 percent of the decisions — an almost perfect record.

The findings of this report demonstrate that, with 65 late disclosure decisions, the practice is common.[164] Over 10 percent of the Study's decisions involved the late disclosure of information. Due to the generally accepted notion that there is no *Brady* violation if the information is disclosed in time for "its effective use at trial,"[165] courts almost never find the late disclosure of information a violation of *Brady*. In fact, of the 65 late disclosure decisions in the Study Sample, only one resulted in a *Brady* violation. Thus, even when the government failed to disclose favorable information in a timely fashion, it still prevailed on the *Brady* claim in over 98 percent of the decisions — an almost perfect record. Judicial indifference encourages the continued practice of late disclosure, which the data strongly suggests has evolved into a trial tactic rather than an allowance for exceptional and necessary circumstances.[166]

B. The Due Diligence 'Rule'

The Study Sample includes 19 decisions in which the court denied the *Brady* claim based, at least in part, on an assertion that the defense knew or should have known about the relevant information or could have obtained the information through the exercise of its own due diligence.[167] In binding the defendant to this **due diligence 'rule**,' courts reason that the prosecutor's failure to disclose the relevant or favorable information is not a breach of duty if the defendant with any reasonable diligence could have obtained the information on his own.[168] These courts conclude that *Brady* simply is not implicated if "a defendant knew or should have known the essential facts permitting him to take

advantage of any exculpatory information[.]"[169] When a court invokes the due diligence rule, however, it is engaging in burden shifting — alleviating the prosecution from its obligation to disclose the relevant or favorable information by imposing an obligation on the defense to seek out the information.

Under the due diligence 'rule', a prosecutor is encouraged to hide, and a defendant is unfairly burdened to seek, information that a prosecutor should disclose.

1. Due Diligence 'Rule' Sample Decisions

The majority of **due diligence decisions** in the Study Sample involved information contained within police reports and government documents. For example, in *Abdur'Rahman v. Colson*, portions of a police report documenting the erratic behavior of Abdur'Rahman were withheld from the defense.[170] The information in these redactions supported the central theme of Abdur'Rahman's defense — that he was a man who suffered emotional problems, was particularly susceptible to manipulation, and was not the calculated depraved killer the prosecutor depicted at trial.[171] Specifically, the redacted portions memorialized observations that, upon arrest at the police station, Abdur'Rahman cried and banged his head against the table and the wall, and that after the detectives got him under control and relocated him to the booking room, he again began banging his head against the wall.[172] The government offered no explanation for the redactions and failure to provide a complete report to Abdur'Rahman.

The defense argued that the report could have caused one or more jurors to vote in favor of a life sentence over death.[173] The court, in its majority opinion, rejected the defense argument: "[W]e are not convinced that, at the time of the sentencing phase, petitioner did not know the essential facts of the behavior described in [the Detective's] report. … The prosecution's suppression of this part of [the Detective's] report does not undermine our confidence in petitioner's sentence."[174] The court reasoned further: "If [defense] counsel did not know the essential facts of Abdur'Rahman's head-banging[,]" then "he likely should have discovered them through further investigation."[175] The court's reasoning assumes, incorrectly, that a defendant is capable of telling his lawyer the statements he made and the behavior he engaged in during an extreme emotional disturbance. Further, it minimizes the weight that a jury might give to the recorded observations of the defendant by a police officer.

As acknowledged by Judge Cole in his dissent, "[T]he fiction that the defense had the time and aptitude to discover what the prosecution had a constitutional obligation to provide underpins the [court's] dismissal of the exculpatory evidence at issue[.]"[176] Further, "[w]ith respect to the [] report, the majority washes its hands of the prosecution's deliberate withholding of this evidence by insisting that [defense] counsel knew the fuzzy contours of the report and that through investigation he 'should have discovered' the essential facts that it contained."[177] In that regard, the court minimized the weight of a detective's written statement contained within a police report by equating it with an oral statement made by a defendant that, on its face, appears self-serving.

2. Problems Created by the Due Diligence 'Rule'

The due diligence rule puts unreasonable expectations on defendants to obtain information that is not readily accessible to the defense, but which is almost always within easy reach of

prosecutors.[178] Under the due diligence rule, a prosecutor is encouraged to hide, and a defendant is unfairly burdened to seek,[179] information that a prosecutor should disclose. The rule is rationalized on two grounds. "First, prosecutors should not be punished for failing to provide the defense with facts or [information] that defendants or defense counsel could have obtained themselves."[180] Second, if a defense attorney is not diligent, the defendant can subsequently raise a claim of ineffective assistance of counsel.[181]

These rationalizations "are contrary to the Due Process Clause, as interpreted in *Brady* and its progeny."[182] The first rationale runs contrary to the truth-seeking process. The inspiration behind *Brady* is the concept that justice prevails when *all* the evidence is before the jury. The second rationale, instituting an ineffective assistance of counsel claim as a fail-safe, is troubling for several reasons. It is a waste of government resources to require the defendant to unnecessarily pursue an ineffective assistance of counsel claim. This is especially so when the situation could easily have been avoided had the prosecutor shared the information in the first place. Further, an ineffective assistance of counsel claim, considered years after the information is withheld and years after conviction, almost never leads to relief for the defendant and "is no substitute for having the benefit of the evidence at trial when the defendant might avoid the conviction altogether."[183] Even where counsel is found to be ineffective, it is extremely difficult for a defendant claim to obtain relief under harmless error analysis.[184]

For some prosecutors, the due diligence rule facilitates the sort of gamesmanship that undermines the intent of *Brady*.

The due diligence rule is contrary to due process and inconsistent with *Brady* jurisprudence, which requires that "evidence tending to show innocence, as well as guilt, be fully aired before the jury."[185] The due diligence rule relieves the prosecutor of his obligation to "assist the defense in making its case"[186] and imposes an expectation on a defendant to access information that is often not realistically within reach. A defendant's ability to actually obtain the information is often limited by a lack of resources — resources that prosecutors readily have at their disposal.

3. Due Diligence 'Rule' Conclusion

This study illustrates the ramifications of courts invoking the due diligence rule — prosecutors are incentivized to withhold relevant or favorable information, rather than encouraged to abide by their duty to err on the side of disclosure.[187] In 19 decisions, or just over three percent of the Study Sample, courts imposed the due diligence rule upon the defendant and excused the prosecution's non-disclosure. The undisclosed information in most of these due diligence decisions fits into four major categories: (1) witness statements,[188] (2) defendant's own statements or conduct,[189] (3) witness criminal records,[190] and (4) police reports.[191] Witness statements and police reports are typically in the sole possession of the prosecution team, making the prosecution, not the defense, best positioned to know of the information's existence. And when in possession of criminal records, the prosecution's decision to disclose that record to the defense should not turn on whether the record is publicly available — it should simply be disclosed.

For some prosecutors, the due diligence rule facilitates the sort of gamesmanship that undermines the intent of *Brady*. Judicial reliance on the due diligence rule turns the *Brady* inquiry away from the prosecutor's obligation to disclose favorable information and, ultimately, decreases defense access to favorable information.[192] Despite the prevalence of courts imposing the due diligence rule on the defense, it is worth noting that a recent Michigan Supreme Court opinion held "that a diligence requirement is not supported by *Brady* or its progeny."[193]

C. Incentive/Deal Information

According to Northwestern University Law School's Center on Wrongful Convictions, 45.9 percent of documented wrongful capital convictions have been traced to false informant testimony, making "snitches the leading cause of wrongful convictions in U.S. capital cases."[194] In spite of demonstrated proof that informant testimony is a leading cause of wrongful conviction, prosecutors continue to rely on it heavily.[195] As reflected in Figure 15 on page 36, within the 620 Study Sample decisions, a total of 101 involved **incentive/deal information**. These are decisions in which prosecutors made deals with witnesses, witnesses had an admitted self-interest to testify, witnesses received unexplained benefits, or there was a suggestion that a witness had a self-interested motive to testify.

1. Incentive/Deal Information Sample Decisions

Notwithstanding the clear impeachment value of information that a witness is testifying in exchange for government favors or has another incentive to testify against the accused, courts routinely hold that such information is not material and that its non-disclosure does not amount to a *Brady* violation.

◆ Deal with Witness to Testify

In *Hunt v. Galaza*, evidence of a deal with a witness was disclosed only after Victor Hunt's trial and conviction for second-degree murder.[196] The prosecutor informed Hunt's defense counsel that a discovery violation had occurred — that the government had failed to disclose that a witness had been offered a deal in exchange for testifying. In response to Hunt's request for post-conviction relief, the court said, "There is no dispute regarding whether the evidence of [the witness's] proposed plea deal was favorable to petitioner or was suppressed by the government."[197] Nonetheless, the court held that because the witness had been impeached at trial with information of prior convictions, pending criminal charges, and a mental health problem, the deal information was cumulative and therefore not material.[198]

Despite what the court said was the "undeniably damaging" effect of the witness testimony, it rejected the notion that this additional impeachment evidence could have made a difference.

— Payton v. Cullen

◆ Admitted Self-Interested Motive to Testify

In *Payton v. Cullen*, a key prosecution witness testified that he was not working for a law enforcement agency "in any capacity."[199] The witness's true role only came to light more than two decades after William Payton was convicted

of rape and murder.[200] The witness then admitted that, at the time of his testimony, he "was and had been for some time working for various police agencies"[201] and considered himself to be working as a government agent during that time. Seeking relief for the prosecution's failure to disclose this information, Payton argued that impeachment of the witness with these facts would have "changed the calculus on the believability of his testimony"[202] and affected the jury decision.

The court, however, found that "[w]hile it would no doubt have been helpful to [Payton] because of its impeachment value ... [t]he jury knew that [the witness] had prior convictions, and that he had recently pled to a felony robbery charge ... [and] hoped for leniency for testifying against Payton."[203] The court reasoned that the jury was well aware that the witness "had a motive for testifying, and for testifying in such a way as to maximize benefit to himself."[204] Despite what the court said was the "undeniably damaging" effect of the witness testimony, it rejected the notion that this additional impeachment evidence could have made a difference.[205] The court found the information not material and *Brady* not violated.

"[P]rosecutors are adept at holding out hopes for leniency to a cooperating witness without creating any legally cognizable 'promise' subject to disclosure."

— R. Michael Cassidy

◆ Unexplained Benefits Given to Prosecution Witness

In *Cooper v. McNeil*, Richard Cooper, a Florida inmate, was convicted of three counts of first-degree murder.[206] During the penalty phase, the prosecution called an incarcerated former police officer who had previously served as a jailhouse informant. By recounting a confession that Cooper allegedly made to him, the witness provided the prosecution with damning testimony in support of the death penalty. The defense knew of the witness's past work as an informant, and that information was shared with the jury, but the prosecution did not disclose any information on the benefits or incentives the witness had for testifying.[207]

Seeking post-conviction relief, Cooper argued that the witness received a variety of benefits — a trip outside the prison to eat dinner with his family, conjugal visits, and a reduction of sentence in three grand theft cases — that were in exchange for his testimony.[208] Lacking evidence that tied these benefits directly to the witness's testimony, the court dismissed Cooper's claim as mere speculation. The court found "a dearth of evidence in the record" to support the defense claim. The one exception was the opportunity the witness had to leave the prison to have dinner with his family.[209] In that instance, the court accepted the witness's representation that his extraordinary opportunity to take a trip outside the prison to have dinner with his family was not a favor in exchange for his cooperation but rather "was granted because he was not allowed the same contact visits as other inmates due to his solitary confinement, which was because of security reasons[.]"[210]

◆ Other Information Suggesting Incentive

In *United States ex rel. Young v. McCann*,[211] James Young was prosecuted and convicted of murder in the gang-related shooting of two men near a Chicago housing project. According to the prosecution, the shooting was to avenge a sexual assault of A.W., Young's girlfriend, committed by

rival gang members. Immediately after the killings, police interviewed A.W., who denied any connection to Young and the events surrounding the shooting. She was later called as a witness before the grand jury where she again denied involvement. At trial, however, A.W.'s testimony contradicted her earlier version of events — she implicated Young and four other gang members in the murders.[212]

Specifically, A.W. testified that she reported the assault to Young and walked him and members of his gang around the neighborhood to identify her attackers. Another prosecution witness testified that a few hours later Young and his fellow gang members committed the murders. During her testimony, A.W. explained that her prior account had been untruthful and motivated by her fear at that time of Young and other gang members.[213] She said that she did not provide the "true account" to the officer and assistant State's attorney until after she was relocated out of the housing project.[214]

Young argued that A.W.'s trial account was motivated by favors she received from the State. First, Young pointed out that A.W's testimony changed only after the State relocated her out of the housing project. Young also argued that prosecutors failed to provide him with her new, different version of the events. Second, "the State failed to disclose that police had promised A.W. that she would not be prosecuted for perjury if she gave a different version of events at trial."[215] The court rejected both defense claims and affirmed Young's conviction. It found no information to support the immunity claim, noting that "[O]fficer Winstead testified that he informed A.W. that he could make no guarantee of immunity."[216] The court reasoned further that Young "had sufficient opportunity to explore any suspected bias on cross-examination."[217]

2. Problems Created by Withholding Incentive/Deal Information

Former prosecutor and Senior Circuit Judge for the Ninth Circuit Stephen S. Trott said,

> Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[218]

According to Professor Cassidy, "The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government."

The Supreme Court has also raised concerns about the use of informant testimony:

> [T]he evidence of such a witness ought to be received with suspicion, and with the very greatest of care and caution, and ought not be passed upon by the jury under the same rules governing other and apparently credible witnesses.[219]

Although there are inherent risks, prosecutors rely heavily on the testimony of informants and sometimes fail to disclose the fact that the witness is receiving benefits in exchange for testimony.[220] Moreover, "prosecutors are adept at holding out hopes for leniency to a cooperating witness without

creating any legally cognizable 'promise' subject to disclosure."[221]

According to Michael Hersek, California State Public Defender, prosecutors in death penalty cases in particular rely on informant testimony when they have little independent evidence against the defendant:

> I've noticed that in death penalty cases snitch testimony is used to (1) bolster shaky identity testimony (where the informant claims that the defendant admitted the crime); (2) show premeditation; and/or (3) establish at the *guilt* phase the special circumstance allegation, which if found true by the jury, makes a first degree murder eligible for the death penalty. (Pen. Code § 190.2 lists all the special circumstances.) As to the special circumstances, I've seen the snitch used to supply the motive and intentionality requirements not necessarily present simply from the raw facts of the crime.[222]

Without discovery of the oral assurances made to the witness "the defense is handicapped in cross-examining the witness for bias."

— R. Michael Cassidy

Informants typically cooperate and provide information in exchange for some sort of benefit, and the prosecution is required to disclose that benefit to the defense.[223]

In *Giglio v. United States*, the U.S. Supreme Court held that a prosecutor must inform the jury when a government witness has been offered an incentive in exchange for his testimony.[224] "[A] promise, reward or inducement to a government witness in a criminal case is considered exculpatory evidence subject to mandatory disclosure to the defense under the Due Process Clause of the Fifth Amendment."[225] Despite the concerns and the attention that the use of informants has received from courts and legal experts, the "impact of *Giglio* in terms of guaranteeing meaningful disclosure to defense counsel has turned out to be largely illusory."[226] This is best understood by considering the ways in which cooperation agreements between the prosecution and informant witnesses are made.

According to Professor R. Michael Cassidy, former Chief of the Criminal Bureau in the Massachusetts Attorney General's office, there are three models of cooperation.[227] In Model One, the prosecutor makes no initial promises to the witness. At the conclusion of the witness's testimony, however, the prosecutor and the defense attorney bargain for the appropriate charge and sentence based upon what the prosecutor assesses to be the value of the witness's testimony to the prosecution's case. In this scenario, the risk is that the witness, knowing that his fate depends upon the prosecutor's satisfaction with his testimony, will conform his testimony to best support the prosecution's case even if that means not being completely truthful. According to Professor Cassidy, "The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."[228]

In Model Two, the witness is allowed to plead guilty to a lesser offense and is sentenced before providing testimony.[229] Of the three models, this provides the greatest disadvantage to the prosecutor. Not only must the prosecutor trust that the witness will live up to his side of the bargain, but because a deal has been made, under *Giglio* the prosecutor is required to disclose to the jury that the witness is receiving a benefit for his testimony.

Under Model Three, the witness pleads guilty before testifying but sentencing is delayed until after the defendant's trial.[230] According to Professor Cassidy, these agreements are written in such a way that the witness's "obligation is very clear (*i.e.*, to tell the truth), but the prosecutor's obligation is open-ended (*e.g.*, the prosecutor will consider whether to file a substantial assistance motion and/or will make the witness's level of cooperation known to the sentencing judge)."[231] A critical fact to be underscored in this scenario is that the prosecution, and the prosecution alone, decides what is "truthful" testimony. Thus, the obligation in the agreement to "tell the truth" is really an obligation to testify to what the prosecution wants, hopes, or expects the "truth" to be.

Having the witness enter a guilty plea prior to testifying, but delaying the sentencing of that witness until after the trial concludes, accomplishes two things. As in the first model, the witness knows his fate depends upon the prosecutor's satisfaction with his testimony and, therefore, has incentive to conform his testimony to best support the prosecution's case. At the same time, because the prosecution's side of the bargain is open, the witness can honestly testify that no promises have been made in exchange for his testimony, even though there is clear incentive for the witness to conform his testimony to align with the prosecution's theory of the case. This raises serious concerns since these decisions are in cases in which there is incentive to testify untruthfully, but the disclosure obligations triggered by *Giglio* do not apply.[232]

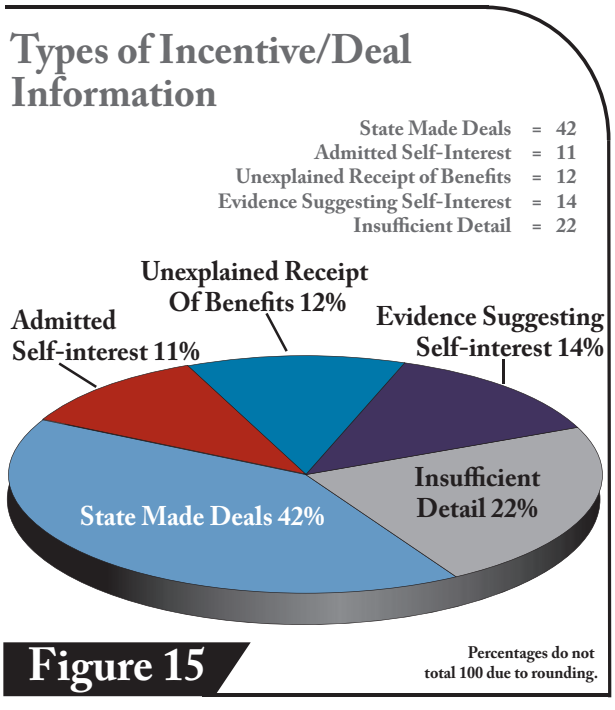
Without discovery of the oral assurances made to the witness by the prosecution in Models One and Three, "the defense is handicapped in cross-examining the witness for bias. The witness can testify that he is cooperating 'because it is the right thing to do' (Model One) or can testify that 'what happens to me is up to the judge' (Model Three) and the partial falsity of these statements cannot be exposed successfully on cross-examination."[233] A mere hope or expectation of leniency by a cooperating witness or his counsel does not trigger *Giglio* disclosure, absent an affirmative representation by the prosecution. Thus, in Models One and Three, the prosecution is able to circumvent the risk of a *Brady* violation by deliberately diluting the favorable aspect of the benefit conferred while still ensuring the cooperation of the witness. In this way, the prosecution is violating the spirit of *Brady v. Maryland* without technically committing a *Brady* violation.

The prosecution, and the prosecution alone, decides what is "truthful" testimony. Thus, the obligation in the agreement to "tell the truth" is really an obligation to testify to what the prosecution wants, hopes, or expects the "truth" to be.

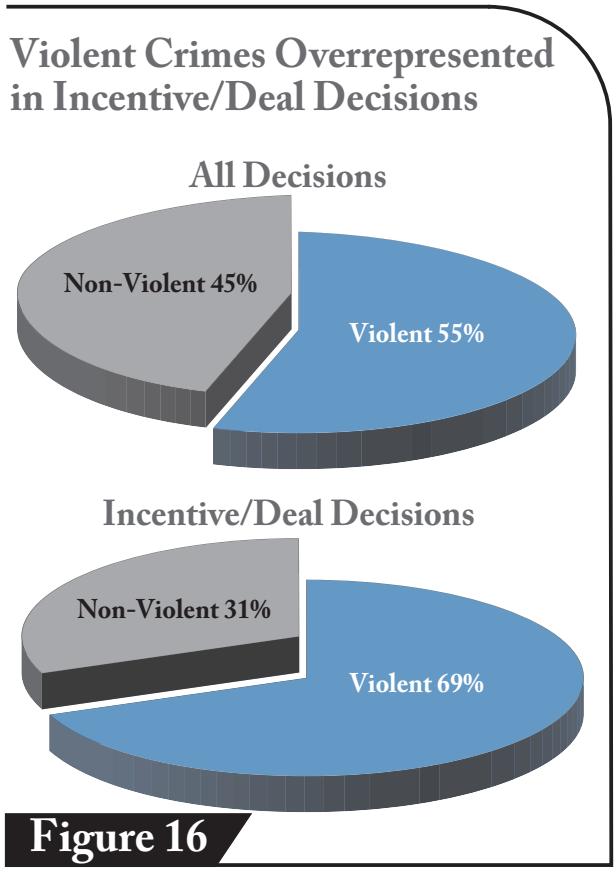
3. Incentive/Deal Information Conclusion

While it cannot be determined from the record how many of the decisions in the Study Sample are Model One or Model Three decisions, there is ample evidence to suggest that there are a significant number.[234] Out of the 101 incentive/deal decisions identified, 42 involved prosecution-made deals with witnesses, 11 contained witnesses admitting a self-interested reason to testify, 12 involved prosecution witnesses receiving unexplained benefits, and 14 included information suggesting the witness had a self-interested motive to testify. The existence of incentive/deal information could not be substantiated in 22 decisions.

Figure 15 shows the percentage of each type of incentive/deal information in relation to all 101 incentive/deal information decisions. ***See*** **Figure 15**.



The incentive/deal category of decisions reveals certain interesting connections. Nearly 70 percent of the incentive/deal decisions involve violent crimes, which is noticeably higher than the percent of violent crimes — 55 percent — in all the decisions in the Study Sample. The side-by-side pie charts in Figure 16 illustrate the overrepresentation of violent crimes in incentive/deal decisions. ***See*** **Figure 16**.



As illustrated in the side-by-side charts in Figure 17, incentive/deal information is overrepresented in *Brady* violation decisions.[235] Whereas only 16 percent of all decisions involve information of incentives or deals, 36 percent of the *Brady* violation decisions involve incentive/deal information. ***See* Figure 17**.

The 20 percentage point difference shown in Figure 17 suggests that courts may have an easier time appreciating the value of impeachment information than they do exculpatory information. These findings also reinforce the notion that judges may find it more challenging to view non-impeachment exculpatory information from the defense perspective than they do impeaching information.

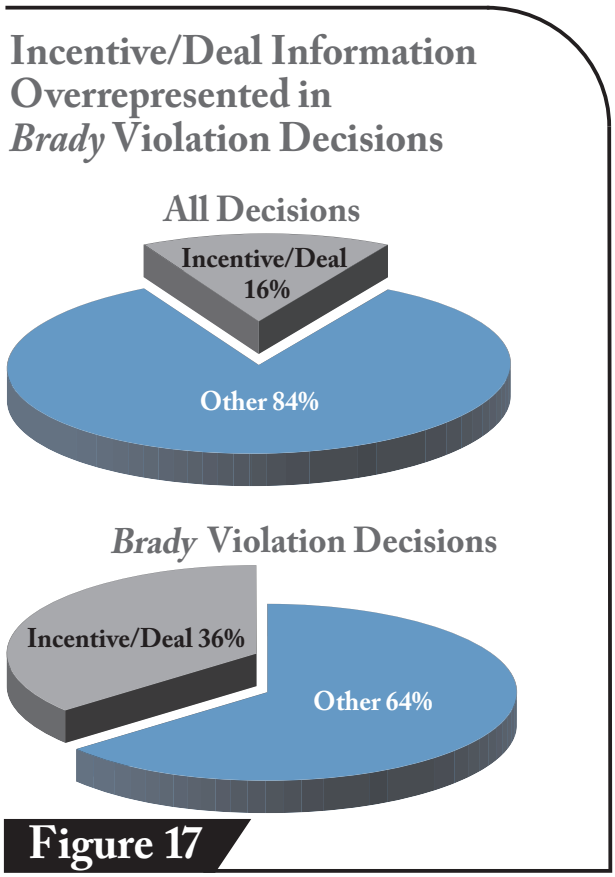


Figure 17

Because of the inherent unreliability of informant testimony, rules requiring disclosure and other trial safeguards are necessary to assist juries in evaluating witness credibility.[236] When prosecutors fail to disclose the fact that they are presenting a cooperating witness or a witness who expects to receive a favor, defendants are denied access to these safeguards. Juries are left to weigh the credibility of the informant testimony without knowing the testimony should be viewed with suspicion. The defendants are denied the opportunity to cross-examine these informants about the self-serving nature of their testimony. And the defendants do not have the benefit of the cautionary jury instruction to which they are entitled. Thus, despite disclosure rules and trial safeguards, there remains a high risk that cooperating witnesses will testify falsely, juries will believe that testimony, and wrongful convictions will result.[237]

Courts have acknowledged "the reality that the Government has ways of indicating to witness's counsel the likely benefits from cooperation without making bald promises." [238] To address the inherent problems in dealing with informant witnesses, there needs to be a broader construction of *Giglio* by the courts. As Professor Cassidy recommends, courts should broaden their definition of "promises, rewards, and inducements" under *Giglio* to capture any statement by a government agent to a witness that the agent knows or reasonably should know may be construed by the witness to suggest favorable consideration on a pending or anticipated criminal charge.[239]

VII. WITHHOLDING OF FAVORABLE INFORMATION

In *Strickler v. Greene*, the Supreme Court distinguished "real" *Brady* information from "so-called" *Brady* information.[240] "Real" *Brady* information is favorable information that would be deemed "material," *i.e.*, would change the outcome of a case. "So-called" *Brady* information is all other favorable information.[241] One purpose of this study was to assess the extent to which *Brady* violation claims involve the withholding of favorable information.

The 210 favorable information decisions represent a small fraction of all cases in which prosecutors withheld information from the defense. The true number is unknowable.

Favorable information includes both exculpatory and impeachment information. Exculpatory information tends to negate the guilt of the accused or mitigate the defendant's sentence.[242] Impeachment information tends to have a negative impact on the credibility or reliability of a government witness.[243] The duty to disclose impeaching information is the same as the duty to disclose exculpatory information[244] and applies without regard to whether the information would be admissible at trial.[245] The study identified 210 decisions in which favorable information was withheld or disclosed late. These decisions turned on the question of materiality. In 188 decisions, the court deemed the information not material or concluded the late disclosure did not materially prejudice the defendant.

Figure 18 is a graph showing how courts resolved the 210 decisions in which favorable information was withheld or disclosed late. The defendant prevailed in only 10 percent of these decisions. ***See* Figure 18**.

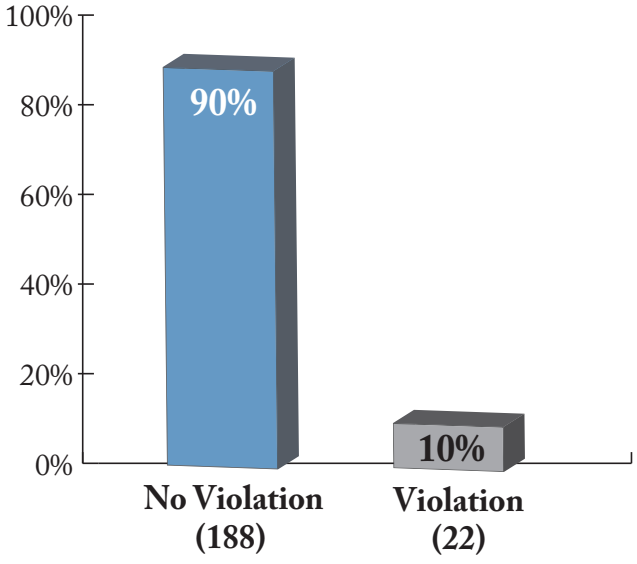


Figure 18

Material Indifference:

In assessing the frequency with which favorable information was being withheld, the Research Team found that looking to the courts for guidance was of limited use. Decisions in the Study Sample rarely articulated whether a particular piece of information was favorable or not. In the Study Sample, many courts issuing decisions skipped the discussion of information favorability altogether and moved directly to the question of materiality.[246] Though many courts did not explicitly refer to information as "favorable," they often used language that acknowledged the exculpatory or impeachment character of the information.[247] Thus, in order to tabulate the total number of decisions within the Study Sample in which favorable information was withheld, the Research Team looked to the court's express articulation of favorability, its acknowledgment of the exculpatory or impeachment value of the information, or, where the court was silent, researchers implemented an independent analysis of favorability based on the facts.

A. Courts Expressly State the Information Is Favorable

Of the 210 favorable information decisions, in only 45 did the court explicitly use the word "favorable" in characterizing the withheld information, 22 of which were *Brady* violations. One example, not a *Brady* violation decision, is *Moya v. Sullivan*, in which the pre-trial prosecutor failed to disclose to the trial prosecutor critical information she learned at the time of the preliminary hearing regarding the eyewitness's failure to identify the defendants at the post-arrest show up.[248] When this fact was uncovered at trial, the trial court found the non-disclosure of this information constituted a *Brady* violation, but concluded it could be cured through the testimony of a detective and an instruction addressing the failure to disclose. In characterizing the information, the district court said that the failure to make an identification "constituted evidence that was *favorable* to the defense."[249] Despite finding the information favorable, the court concluded that the failure to disclose it was not materially prejudicial.[250]

B. Courts Acknowledge Exculpatory or Impeachment Value of the Information

Rather than expressly characterizing withheld information as "favorable," courts were more likely to acknowledge the exculpatory or impeachment value of the information. For example, in *Salgado v. Allison*, Salgado was charged with attempted murder and assault with a deadly weapon.[251] The central issue at trial was the identity of the perpetrator. The *Brady* claim was based on the prosecution's failure to disclose a composite drawing and its accompanying description of the suspect based on information furnished by the victim immediately after the attack. What was remarkable about the composite drawing was that it portrayed a person very different in appearance from Salgado. Nonetheless, despite the differences between the victim's description to the police and Salgado's appearance, the victim positively identified Salgado at trial as his attacker.

Courts often skipped over the favorability prong of the *Brady* analysis altogether and moved straight to the question of materiality.

Although the reviewing court failed to use the word "favorable" in reference to the withheld information, it acknowledged the information's exculpatory and impeachment value by reference to the state court of appeals opinion:

> Despite the People's arguments to the contrary, we agree with [petitioner] that the composite drawing and its accompanying description of the suspect were clearly exculpatory evidence that should have been disclosed to the defense. The composite drawing, based on information furnished by [victim] immediately after the attack, shows a suspect whose appearance is very different from [petitioner's] appearance. More importantly the composite drawing is accompanied by a description of a suspect that differs greatly from the description of [petitioner].[252]

Relying on the cumulative nature of the information to deny a *Brady* claim is logically flawed and is another illustration of the manner in which judicial reliance on the *Brady* rule encourages non-disclosure.

Despite agreeing with Salgado on the salient facts and finding the information exculpatory, the court cited the strength of the prosecution's evidence to reject Salgado's *Brady* claim.

Another example of a court acknowledging the exculpatory or impeachment value of information involves the non-disclosure of information that calls into question prosecution efforts to present a witness as neutral and disinterested. In *Gentry v. Morgan*, Gentry was convicted of aggravated first-degree murder and sentenced to death based on evidence that included the testimony of two government informants, Brian Dyste and Timothy Hicks.[253]

Regarding Brian Dyste, the government stipulated that the "State had no relationship with any of its witnesses" and Dyste "testified at trial that he was not given anything in exchange for his testimony[.]"[254] Rejecting these claims, the court found that Dyste had in fact acted as a paid informant for Detective Pfitzer during the relevant time period.[255] Without expressly characterizing the undisclosed information as favorable, the court held that it "plainly has impeachment value" and Gentry could have used it to "impeach Dyste's credibility."[256]

Likewise, concerning Timothy Hicks, the court said, "[r]espondent's insistence that Hicks received no 'deal' in exchange for his testimony is a carefully worded argument intended to suggest that Hicks received nothing in exchange for his testimony, a notion that is clearly belied"[257] by the evidence. Further, the court said that "the prosecution could dispute the materiality or impeachment value of this information, but its responsibility to disclose the information is indisputable."[258] Without specifically describing the withheld information as "favorable," the court clearly acknowledged the impeachment value of the information to the defense.[259]

Despite the court's acknowledgement that the undisclosed information had impeachment value, it ultimately rejected Gentry's *Brady* claims. The court concluded that the non-disclosure of this information was "not prejudicial to Gentry when considered collectively in the context of the evidence presented at the guilt phase of the trial."[260] The court affirmed Gentry's conviction and death sentence.

Material Indifference:

C. Favorability of the Information Implicit in the Facts

In some decisions in the Study Sample, courts skipped over the favorability prong of the *Brady* analysis altogether and moved straight to the question of materiality. In many of these decisions, however, the favorability of the information at issue was implicit in the facts. In one such example, *Trevino v. Thaler*, a prosecutor failed to disclose a co-defendant's written statement linking someone other than Trevino to the crime.[261] The court deemed the information immaterial because the co-defendant made a subsequent inconsistent statement. The dissent disagreed, asserting that the statement could have been effectively used "to exculpate [petitioner] and challenge the credibility of the state's witnesses against him in the guilt and penalty phases of his capital murder trial."[262]

Stevenson v. Yates is another decision in which the favorability of the information was implicit in the facts.[263] In that case, Stevenson was the driver of a truck from which a passenger shot and killed a man. He was subsequently convicted of aiding and abetting a murder. Central to the prosecution's case was witness Kelly Reaves, who testified that Stevenson drove his truck directly at the victim. So crucial was this evidence that the prosecutor in closing argument told the jury, "Mr. Stevenson drove the car at them. The testimony was it was driven directly at them. ... He punched it and went directly at the victims in this case."[264]

In contrast, after the trial, the prosecutor produced an audiotape recording of a police interview with Reaves in which the witness told police, "It looked like [Stevenson] just wanted to turn off, you know. Turn into the lane and just take off."[265] This crucial evidence corroborated Stevenson's testimony that he was trying to drive away and not aiming the truck at the victim. The trial court denied Stevenson's motion for a new trial, finding there was nothing material in the tape recording, and the reviewing court rejected his *Brady* claim on the same basis.

The dissent disagreed, concluding this non-disclosure was a *Brady* violation. The dissent said, "[O]ne might consider the language of the audiotape to be ambiguous. … Such matters are in the province of the jury. In either case, it seems clear from the audiotape transcript that Stevenson turned the truck, a fact which undermines the prosecution's theory at trial. ... Stevenson's lawyer, if he had received the audiotape, was entitled to present his most vigorous defense with that audiotape supporting his client's views."[266]

Over 34 percent of the Study Sample decisions involved the withholding or late disclosure of favorable information.

And in *Brooks v. Tennessee*, a third decision with strong facts implying the favorability of the information, Brooks had been convicted of first-degree felony murder and sentenced to life in prison based in part on the testimony of Michael Nelson.[267] During the post-conviction proceedings well after the trial, Brooks learned that Nelson had a prior conviction for forged instruments and perjury. The perjury charge was based on Nelson's false testimony against another person years earlier, which led to the man being arrested and charged with attempted murder. Brooks argued that the prosecution violated his due process rights by failing to disclose this important impeachment information about its key witness Michael Nelson.

Without explicitly finding this information favorable, the court went directly to the question of materiality, which it characterized as "a close one."[268] The court reasoned that "[a]s a professional and ethical matter, the prosecution should have discovered this important background information about Nelson before calling him as a witness."[269] "This is particularly true," the court stated, when the prior convictions "were obtained by *the very same prosecutor's office* as was trying Brook's case."[270] Finally, the court admonished the prosecution for "failing to correct" Nelson's "inaccurate testimony at trial concerning the extent of his prior criminal history[.]"[271]

The judiciary's almost unilateral focus on materiality conveys a message that non-material favorable information is unimportant and need not be disclosed.

Ultimately, the court declared the prosecution's conduct "a serious professional failing[,]" but conceded that "the *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor."[272] The court found that because Brooks impeached Nelson on other grounds, Nelson's conviction for providing false testimony in the past would only have been cumulative in this case. Affirming Brooks' conviction, the court concluded that "although this issue is uncomfortably close to the constitutional line, the undisclosed evidence was not material under *Brady*."[273]

D. Withholding of Favorable Information Conclusion

The 210 favorable information decisions in the Study Sample represent a small fraction of all cases in which prosecutors withheld information from the defense. The true number is unknowable. The 210 decisions include a wide range of withholding, from late disclosure to complete non-disclosure. While the courts in nearly all these decisions ultimately decided the withholding of favorable information did not materially prejudice the defendant, the most important point is that valuable information that could have helped bolster the defense theory, led to a more effective trial strategy, or led to other material information was not turned over to the defense.

When the withheld information is favorable, courts sometimes deny *Brady* claims based on the assertion that the information is cumulative and, as such, it would not have made a difference in the outcome of the case. This reasoning ignores the fact that cumulative information may still be critical information in the eyes of the jury; it is not readily apparent what or how much information a jury will find persuasive. One additional instance of impeachment can make the difference in a juror's assessment of a witness's credibility. Relying on the cumulative nature of the information to deny a *Brady* claim is logically flawed and is another illustration of the problematic nature of the materiality standard and the manner in which judicial reliance on the *Brady* rule encourages non-disclosure.

The number of *Brady* violations uncovered through this study cannot convey the full extent to which favorable information is being withheld. The 210 favorable information decisions identified include 22 *Brady* violation determinations; 23 decisions in which courts expressly articulated that the withheld information, though not deemed material, was favorable; 80 decisions in which the court acknowledged the exculpatory or impeachment value of the information without expressly calling it favorable; and 85 decisions in which, through independent analysis, favorability was found to be implicit in the facts. Of the 620 decisions in the Study Sample, over 34 percent involve the non-disclosure or late disclosure of favorable information.

Figure 19 breaks down the 210 withheld favorable information decisions into one of the three categories discussed above. Specifically, in 22 percent of withheld favorable decisions the court expressly articulated favorability, in 38 percent of these decisions the court acknowledged the exculpatory or impeachment value of the information, and in 40 percent of these decisions the Research Team discerned favorability based on the facts. ***See* Figure 19**.

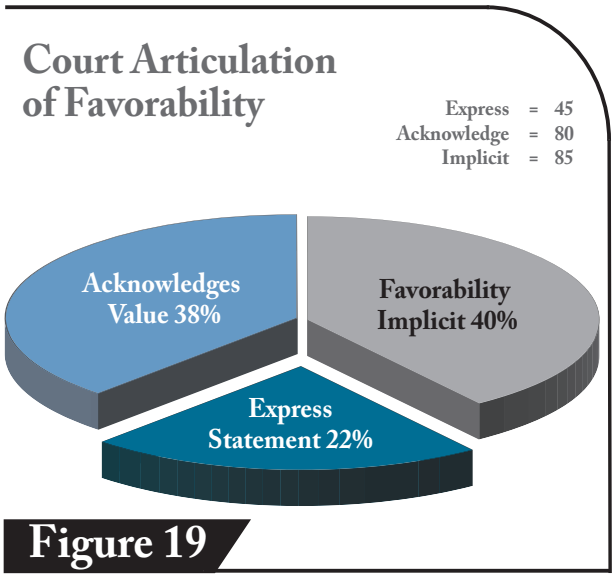


Figure 19

In addition, the Research Team found a correlation between **death penalty decisions** and favorable information decisions.[274] Within the Study Sample, researchers identified a total of 59 death penalty decisions, and in 31 (53 percent) prosecutors disclosed favorable information late or never at all. The side-by-side charts in Figure 20 demonstrate that withheld favorable information is overrepresented in death penalty decisions as compared to all Study Sample decisions. ***See* Figure 20**.

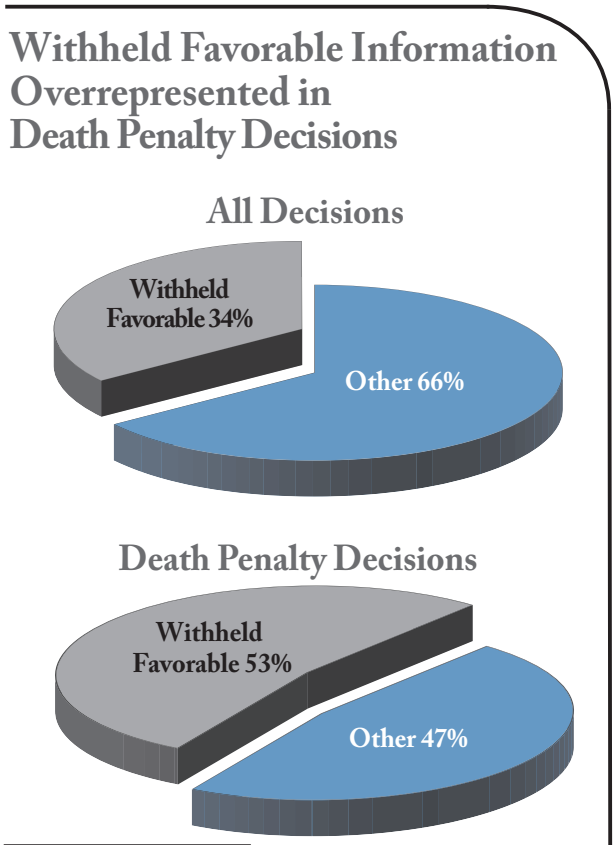


Figure 20

Despite the high stakes involved, the data also shows that courts in death penalty decisions overwhelmingly find withheld information not material. As illustrated in Figure 21, of the 59 death penalty decisions, courts found the information not material in 38 or nearly two-thirds.[275] By comparison, only one-third of all decisions were resolved with a finding that the information was not material. ***See* Figure 21**.

Not Material Resolutions Overrepresented in Death Penalty Decisions

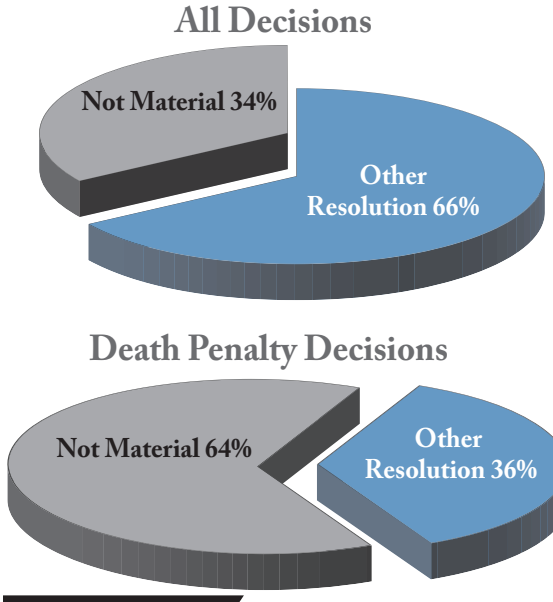


Figure 21

That death penalty decisions are more likely to result in a finding that the undisclosed information is not material could be related to the greater volume of evidence typically introduced in capital cases. Where there is a greater volume of evidence, judges are more likely to view the undisclosed information as cumulative in nature and, therefore, not material to the outcome.

The court's reliance on materiality as the central inquiry in a *Brady* violation claim has evolved into a standard by which prosecutors measure their disclosure obligations. In doing so, prosecutors conflate two distinct issues: (1) the obligation to disclose favorable information pre-trial, and (2) the court's application of the materiality standard post-trial. Taking cues from the way in which courts analyze *Brady* claims in the post-trial context, the prosecutor's inquiry becomes not whether a piece of information is favorable, but instead whether the information would have made a difference in the outcome of the case. The judiciary's almost unilateral focus on materiality conveys a message that non-material favorable information is unimportant and need not be disclosed. As a result, the current system of judicial review fails to promote a culture of compliance, instead fostering *Brady*, or "so-called *Brady*," violations.[276]

VIII. SUMMARY OF STUDY FINDINGS AND CONCLUSIONS

- **Application of the materiality standard produces arbitrary results.** The study demonstrates the arbitrary nature of the materiality standard. Even when evaluating the same information, in similar factual contexts, and applying the same articulation of the materiality standard, different courts may ultimately resolve a *Brady* claim differently.

- **Materiality determinations overwhelmingly favor the prosecution.** Of all the decisions, only four percent result in a court finding that the prosecution violated *Brady*. In those decisions where the prosecution failed to disclose favorable information, it still won 86 percent of the time, with the court concluding the information was not material. On the issue of materiality, this data demonstrates that the odds are almost always in the government's favor.

- **Courts almost never find *Brady* was violated by the late disclosure of favorable information.** Of the 65 decisions that involve late disclosure of favorable information, only one resulted in a *Brady* violation finding. This means that, for the decisions in this Study Sample, the government has a nearly perfect record when defending late disclosure of favorable information.

- **Disclosed late or never disclosed at all, the withholding of favorable information is rarely found to violate *Brady*.** The study identifies hundreds of decisions in which favorable information was disclosed late or never disclosed at all. And, within this group, the defendant prevails on the question of materiality in only one of every 10 decisions — *i.e.*, the prosecution wins 90 percent of the time.

- **Statements are more likely to be disclosed late.** Of the decisions involving the late disclosure of favorable information, nearly half involved statements.

- **Some courts engage in burden shifting by denying *Brady* claims upon a finding that the defense could have obtained the information on its own with due diligence.** In just over three percent of the decisions, courts excused the prosecutor's failure to disclose favorable information by imposing a due diligence obligation on the defendant. By employing this due diligence rule, courts shift the inquiry away from the prosecutor's obligation to disclose favorable information, and instead focus on the defendant's efforts to find information.

- ***Brady* claims involving information on incentives or deals are more likely to result in a *Brady* violation finding.** The statistical analysis reveals a strong correlation between *Brady* violation decisions and incentive/deal information. Whereas 16 percent of all the decisions involve incentive/deal information, 36 percent of the *Brady* violation decisions involve incentive/deal information.

- **Favorable information is more likely to be disclosed late or withheld entirely in death penalty decisions.** Favorable information was never disclosed or disclosed late by the prosecution in 53 percent of decisions involving the death penalty, but only 34 percent of all the decisions studied.

- **Death penalty decisions are more likely to be resolved with a finding that the information is not material and almost always upon a finding that the information is cumulative.** Nearly two-thirds of the death penalty decisions resulted in a finding that the withheld information was not material. By comparison, only one-third of all the decisions studied were resolved with a not material finding.

IX. MECHANISMS FOR INCREASING FAIR DISCLOSURE

While acknowledging the role that prosecutors play in establishing policies and cultures affecting disclosure,[277] this report focuses on the role of courts in fostering a culture of non-disclosure. This section offers three different proposals for addressing the problems identified in this report. The first reform mechanism can be initiated by criminal defense lawyers in their current practice and by individual judges. The other two mechanisms require action by the judiciary or the legislature through their respective rule and lawmaking functions. Federal and state courts could amend court rules and policies to mandate disclosure of favorable information. State and federal lawmakers could also enact legislation requiring prosecutors to disclose favorable information. Whether through the judicial or legislative process, such reforms would prohibit prosecutors from using the materiality standard to limit the extent of pre-trial disclosure obligations.

A. Court Order for Disclosure of Favorable Information in Criminal Proceedings

On Jan. 1, 2010, the American Bar Association (ABA) officially clarified that Rule 3.8(d) of the ABA Model Rules of Professional Conduct, Special Rules of a Prosecutor, is broader than the constitutional obligation established by *Brady v. Maryland* and its progeny.[278] The ABA explained that although the disclosure obligation under Rule 3.8(d) may overlap with prosecutors' other disclosure obligations, it is "separate from" any imposed under the "Constitution, statutes, procedural rules, court rules, or court orders."[279] "It relies on state law, but it would bind every state *and* federal prosecutor"[280] and has been adopted in every state but California.[281]

Model Rule 3.8(d) states that "the prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."[282] Materiality, under the rule, is not a factor for prosecutors to consider when making the decision of whether or not to disclose favorable information. The rule is also forward-looking, not retrospective, and prosecutors need not assess whether the information would be admissible at trial.[283]

Whether through the judicial or legislative process, these reforms would prohibit prosecutors from using the materiality standard to limit pre-trial disclosure obligations.

As a recently enacted statute adopted in every state with the exception of California, Model Rule 3.8(d) supersedes the Jencks Act, which allows witness statements to be withheld until after the witness testifies for the prosecution.[284] Thus, if a federal prosecutor withholds a favorable statement under the Jencks Act and fails to turn over the statement "as soon as reasonably practicable" as required by Model Rule 3.8(d), then the federal prosecutor would be in violation of federal code provision 28 U.S.C. § 530B(a), which requires federal prosecutors to abide by the state laws and rules, and local federal court rules, governing that particular jurisdiction.[285]

The court should issue an order in each case plainly stating that "willful and deliberate failure to comply" with Rule 3.8(d) will be viewed as contempt of court.

To most effectively enforce Model Rule 3.8(d), defense attorneys should file a pre-trial motion asking the court to issue an **Ethical Rule Order** requiring the prosecutor to search his file and disclose all information that "tends to negate the guilt of the accused or mitigates the offense."[286] The motion should cite the relevant rule in the local jurisdiction. To the extent it makes strategic sense, the attorney could also lay out the defense theory of the case and describe the kind of information that would be favorable and tend to negate guilt. Defense attorneys should be specific in requesting the court to order prosecutors to search the files of law enforcement or other agencies where favorable information is likely to be found and to put on the record or reduce to writing all favorable oral witness statements.[287]

To ensure enforcement, the court should prepare and sign an order in each case plainly stating that "willful and deliberate failure to comply" with Rule 3.8(d) will be viewed as contempt of court. Such an order would avoid the problem that faced the court in the case of the late Senator Ted Stevens. In that case, after granting the Department of Justice's motion to set aside the verdict and dismiss the indictment, District Judge Emmett G. Sullivan was unable to hold the assistant U.S. attorneys accountable for their deliberate failure to disclose information. Judge Sullivan did not have the legal authority to hold the prosecutors in contempt because their actions did not constitute a specific violation of the contempt statute 18 U.S.C. § 401, which requires the intentional violation of a clear and unambiguous court order.

A carefully worded order requiring a prosecutor to comply with Rule 3.8(d) — made at the outset of the case — would bind prosecutors and make it possible for judges to hold in contempt prosecutors who willfully fail to comply with the order of the court to disclose favorable information. The presumption that most lawyers will comply with ethical rule orders creates a reasonable probability that widespread use could have a deterrent effect on willful non-disclosure. This should "generally and specifically deter 'bad apple' prosecutors because it is not subject to many of the practical and procedural hurdles that have obstructed punishment even for deliberate, intentional, and malicious *Brady* violations."[288]

Based on recent discussions with leaders in the prosecutorial community and the judiciary, there is a growing consensus that the prosecutors who deliberately and willfully

withhold favorable information should be sanctioned for the deterrent value alone, even if the withholding is deemed harmless.[289] In a recent *amicus* brief filed by the National Association of Assistant U.S. Attorneys and the National District Attorneys Association in the case of *Pottawattamie County v. McGhee*, prosecutors underscored the effectiveness of consequences and the deterrent value of the threat of bar discipline, criminal prosecution, and political embarrassment.[290] Increased requests for and imposition of an ethical rule order is a direct mechanism for both the defense bar and individual judges to recognize and counter the problems identified by this study.

B. Amendment of Judicial Rules and Policies Governing Disclosure

While the American Bar Association requires that all prosecutors disclose information "that tends to negate the guilt of the accused or mitigates the offense," state and federal rules governing disclosure obligations vary significantly. In the federal system, **Federal Criminal Procedure Rule 16** obligates prosecutors to disclose only "favorable information material to guilt or sentencing,"[291] allowing federal prosecutors to withhold other favorable information without breaking the rule.[292] Under state systems, disclosure obligations range "from bare compliance with constitutional minimums to more expansive disclosure requirements."[293] Clear and consistent guidelines to improve defendants' access to favorable information are needed and can be achieved through judicial rule and policy reform.

Judicial rule changes, at the state and federal levels, would do a great deal to prevent reoccurrence of the kind of problems discussed in this report.

In 2004, seeking to address problems within the federal system, the American College of Trial Lawyers (ACTL) proposed amending the Federal Rules of Criminal Procedure to "codify the rule of law first propounded in *Brady*," in particular requiring disclosure of all favorable information without requiring a finding of "materiality."[294] In support of its proposal, the ACTL explained that "[b]ecause the prosecutor alone can know and weigh what is undisclosed, he is faced with serious and potentially conflicting responsibilities: to decide whether information is exculpatory, and, if so, whether and when it should be disclosed to the accused."[295]

Faced with fierce opposition from the Justice Department, the ACTL proposal died before reaching the Judicial Conference's full Advisory Committee on Criminal Rules.[296] While NACDL has long championed discovery reform, in recent years federal judges have also begun calling for Rule 16 reform, including Ninth Circuit Judge Alex Kozinski and Judges Paul Friedman and Emmet Sullivan of the U.S. District Court for the District of Columbia.[297] The findings of this Study lend hard evidence to what supporters for reform have been saying — by focusing solely on the question of materiality, courts are encouraging prosecutors to withhold favorable information. Rule changes, at the state and federal levels, would do a great deal to prevent reoccurrence of the kind of problems discussed in this report.

C. Legislation Codifying Fair Disclosure

On March 15, 2012, in direct response to the flawed prosecution of the late Senator Ted Stevens,[298] Senators Lisa Murkowski (R-AK) and Daniel Inouye (D-HI), along with a bipartisan group of co-sponsors, introduced S. 2197, the **Fairness in Disclosure of Evidence Act of 2012**, to provide a clear and meaningful standard governing the prosecution's disclosure obligation.[299] The Act would require prosecutors to disclose all information "that may reasonably appear favorable to the defendant,"[300] effectively prohibiting the government from using the *Brady* materiality requirement to narrow its disclosure obligation. Although the bill has not yet been enacted,[301] it would address the major problems identified and detailed in this report and it serves as a model for bringing about sensible discovery reform through legislation.[302]

The Fairness in Disclosure of Evidence Act is a model for sensible and comprehensive discovery reform that this study demonstrates is critically needed.

The Act would require prosecutors to disclose all "information, data, documents, evidence, or objects that may reasonably appear to be favorable to the defendant in a criminal prosecution" with respect to the determination of guilt, any preliminary matter, or the sentence to be imposed.[303] The disclosure obligation would apply to that which is "within the possession, custody, or control of the prosecution team," known to the prosecution team, or "by the exercise of due diligence would become known" to the prosecution team.[304] The Act defines the term "prosecution team" broadly to include all individuals and agencies, including law enforcement, that act on behalf or under the control of the government or that jointly investigate with the prosecuting agency.[305] In those instances where disclosure could be detrimental to witness safety, the Act includes a fair mechanism for seeking a protective order,[306] and exempts all classified information from the disclosure obligation.[307]

If legislation such as this were enacted, defendants would have increased access to favorable information, thereby reducing *Brady* litigation system-wide. When prosecutors use the *Brady* rule to determine pre-trial disclosure obligations, they engage in a subjective assessment of whether the information would make a difference in the case without the benefit of hindsight. Under this Act, that assessment is removed from the prosecution's decision-making — the favorability of the information alone would trigger the duty to disclose.

The enactment of this legislation would also address the major problems discussed in this report, including the common practice of late disclosure, the imposition of the due diligence rule, and the frequency with which incentive/deal information is not disclosed. Sixty-five decisions, over 10 percent of all the Study Sample decisions, involved late disclosure. Compliance with the language of this Act would require that information be disclosed "without delay after arraignment" or, if its existence is not known, "as soon as is reasonably practicable upon the existence of [it] becoming known."[308] Moreover, because this timing requirement applies "before the entry of any guilty plea[,]"[309] it would better inform the

defense on the strength of the government's case, thereby reducing the pressure on innocent defendants to plead guilty.[310]

This legislation would also significantly reduce, and possibly eliminate, the imposition of a due diligence requirement on the defense. On its face, the Act does not base the prosecutor's disclosure obligation on the defendant's knowledge or access to the information. Prosecutors would be required to disclose favorable information that previously would have been subject to the due diligence rule, such as witness statements, statements by the defendant, police reports, criminal records, and incentive/deal information. The Act would also set forth broad definitions of the covered information and the prosecution team, and place a due diligence requirement on the prosecutor to seek out the information. This legislation would mandate a comprehensive disclosure obligation that should foreclose attempts to impose the due diligence rule on the defense.

The Fairness in Disclosure of Evidence Act is a model for sensible and comprehensive discovery reform that this study demonstrates is critically needed. Providing clear standards aimed at ensuring compliance would remove much of the gamesmanship that is commonplace in the discovery process and result in less litigation and a fairer process.

Under the Act, the favorability of the information alone would trigger the duty to disclose.

X. FINAL THOUGHTS

In *Brady v. Maryland*, the Supreme Court recognized that criminal defendants have a due process right to favorable, material information and that the prosecutor has an obligation to make that information available to the defense. The purpose of the *Brady* decision was not to limit a prosecutor's disclosure obligations by the constitutional parameters articulated in the decision. Courts, when properly analyzing *Brady* claims, are not asking whether the prosecution has fully met its disclosure obligation, since the obligation extends beyond *Brady*, but whether the prosecution withheld favorable, material information, thereby violating a defendant's constitutional right to due process. These two separate questions are often conflated, misleading courts and prosecutors to conclude that prosecutors are not obligated to turn over favorable information unless it is deemed material.

Whereas the courts are charged with applying the *Brady* analysis to protect defendants' due process rights, the disclosure decisions made by prosecutors are not so constrained — the prosecution's disclosure obligation extends far beyond *Brady* and, as such, *Brady* has no role in determining that obligation. The Supreme Court, as well as other courts, has repeatedly stated that prosecutors should err on the side of disclosing more than the constitutional minimum. Courts have made clear that prosecutors are bound by ethical rules beyond *Brady* that require the disclosure of favorable information without regard to materiality. The American Bar Association has expressly articulated that prosecutors have an obligation embodied in ABA Model Rule 3.8(d)[311] to disclose favorable information "as soon as reasonably practical" or, according to the ABA Criminal Justice Standards, at the "earliest feasible opportunity."

Yet, even as some courts encourage disclosure of more than what is constitutionally required and what ethical rules dictate, many other courts disregard these directives and continue to analyze and resolve *Brady* claims in a way that reinforces the incorrect assumption that the prosecutor's obligation is measured solely by the defendant's due process rights. The courts' reliance on materiality to assess disclosure obligations, and its parsimonious application of that standard, have resulted in a rigid materiality rule with a bar set dangerously high. As explained by Ninth Circuit Judge Alex Kozinski,

Courts, when properly analyzing *Brady* claims, are not asking whether the prosecution has fully met its disclosure obligation, but whether the prosecution withheld favorable, material information, thereby violating a defendant's constitutional right to due process.

> By raising the materiality bar impossibly high, [courts invite] prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial.[312]

The findings in this study support Judge Kozinski's conclusion that the materiality bar is set unreasonably high. Out of 210 decisions where favorable information was withheld, the court, in 188, or 90 percent of the decisions, held that the information or timing of the disclosure was not material to the outcome of the case.[313]

Compounding the unduly narrow construction of "materiality" is the unworkable nature of the materiality standard itself, described by Justice Thurgood Marshall as "a pretrial standard that virtually defies definition." The materiality standard requires prosecutors to predict what information will be relevant to the defense's case before the defense's case is known or developed. As Justice John Paul Stevens pointed out in *United States v. Agurs*, "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete."[314] For a prosecutor poised to try to win a case while meeting his responsibility to an opponent in an adversarial system, accurately assessing what information is material poses a significant challenge.

Moreover, as this study demonstrates, several disturbing issues arise within *Brady* jurisprudence that can effectively relieve prosecutors of their disclosure obligations and deprive defendants' access to favorable information. Late disclosure of favorable information is a common problem. More than 10 percent of the Study Sample decisions involved late disclosure of favorable information. Despite the large number of late disclosure decisions identified in the Study Sample, only one resulted in a *Brady* violation finding.

A second troubling issue is the court's imposition of a due diligence requirement on the defense. Researchers identified 19 decisions, or three percent of all the decisions, in which courts imposed a due diligence requirement. When a court refuses to hold the prosecution to its disclosure obligation because the defense could have obtained the information, it sends a message that fulfillment of that obligation is not important, interferes with the truth-seeking process, and unfairly burdens the defense.

The current system's reliance on prosecutors to make these decisions does not facilitate fair disclosure.

Perhaps most troubling of the issues identified by this study is the prevalence of government incentives offered in exchange for informant testimony — despite the strong link between use of informant testimony and wrongful convictions. In this study, researchers identified 101 decisions that involved the promise or insinuation of favor in exchange for testimony. Of the 22 *Brady* violation decisions in the Study Sample, 36 percent involved incentive/deal information, suggesting that courts may have an easier time appreciating the value of impeachment information than of exculpatory information.

The 22 *Brady* violation decisions identified in the study represent just a small fraction of all decisions where favorable information was withheld. In addition to these 22 decisions, researchers uncovered another 188 decisions in which a *Brady* violation was not found, but favorable information was withheld or disclosed late. This study shows

that the manner in which courts review *Brady* claims fosters a culture of non-disclosure by: (1) applying an overly stringent definition of materiality; (2) minimizing the importance of favorable information by failing to make specific reference to its favorability; (3) failing to remind prosecutors of their ethical obligation to disclose non-material favorable information; and (4) regularly excusing the prosecution's late disclosure or non-disclosure of favorable information.

In light of the adversarial nature of the justice system, it is unreasonable to rely on prosecutors alone to fix the problem. As Ninth Circuit Chief Judge Kozinski acknowledged, "[t]here is an epidemic of *Brady* violations abroad in the land" which, in his view, "[o]nly judges can put a stop to."[315] While prosecutors bear some responsibility, it is also true that they are in a conflicted position. The prosecutor is a minister of justice but also an advocate with the pressure to prosecute and win cases. He is tasked with controlling information and playing gatekeeper to what information is disclosed. He decides whether a single piece of information, if withheld, would make a difference in the outcome of a case and on that basis decides whether or not to disclose it. The prosecutor's unilateral, non-transparent application of an unworkable materiality standard may explain why otherwise ethical prosecutors fail to turn over favorable information.

Until the materiality standard is removed as a barrier to fair disclosure, and there are real consequences for withholding favorable information, the system will remain unaccountable to defendants.

In deciding whether favorable information is material to the defense, the prosecutor has to be completely neutral, which as an advocate he cannot be. He must be in a position to understand the defense perspective — what the defense knows and appreciates about the case. "What may appear exculpatory to a defense attorney — or lead to the discovery of exculpatory evidence through additional investigation — may appear only tangentially relevant to a prosecutor."[316] The current system's reliance on prosecutors to make these decisions does not facilitate fair disclosure.

To bring clarity to this issue, provide prosecutors and courts with clear guidance, and ensure that those facing criminal charges are accorded the rights they deserve, there needs to be reform. That reform should come through passage, at the state and federal levels, of a statute consistent with Model Rule 3.8(d) of the ABA ethical rules governing disclosure. Reform also could be attained through amendment of state and federal judicial rules in the same manner. In the meantime, individual judges can order prosecutors to abide by ABA Model Rule 3.8(d) to disclose favorable information that "tends to negate the guilt of the accused or mitigates the offense."

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[317] Until the materiality standard is removed as a barrier to fair disclosure, and there are real consequences for withholding favorable information, the system will remain unaccountable to defendants.

ENDNOTES

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. *See* American Civil Liberties Union of New Jersey, *Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey* (September 2012), *available at* http://pdfserver.amlaw.com/nj/aclu_report09-12.pdf; Kathleen M. Ridolfi & Maurice Possley, Northern California Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (2010), *available at* http://digitalcommons.law.scu.edu/ncippubs/2/; Emily M. West, Innocence Project, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* (2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf; *see generally* The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, http://www.publicintegrity.org/accountability/harmful-error; Investigative Series, *Misconduct at the Justice Department*, USA TODAY, http://usatoday30.usatoday.com/news/washington/judicial/2010-12-08-prosecutor_N.htm#; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1-5)*, CHI. TRI., Jan. 11-14, 1999, at A1.

3. Since its decision in *Brady*, the Supreme Court has further clarified that the prosecutor's duty extends to not just exculpatory information but to all favorable information. Specifically, "the duty encompasses impeachment evidence as well as exculpatory evidence" and thus, "[i]n order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf[], including the police.'" *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This duty is not limited to that which goes to guilt, rather it extends to mitigating information, including that which would reduce the penalty. *See* Peter Goldberger, *Codifying the* Brady *Rule*, THE CHAMPION, May 2013, at 9 (noting that the *Brady* decision dealt with sentencing mitigation and that the majority never actually used the word "exculpatory").

As such, when discussing the type of information that prosecutors must disclose under *Brady*, this report generally uses the term "favorable." However, when exploring individual decisions or data sets, this report may specifically refer to the information at issue as "exculpatory," "impeachment," or "mitigating" information, depending on its precise nature. In all such instances, this report defines "exculpatory," "impeachment," and "mitigating" information as types of "favorable" information and, inversely, defines "favorable" to include information that is "exculpatory," "impeaching," and/or "mitigating" in nature.

4. Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010) (summarizing the purpose and work of the two-day symposium).

5. The Innocence Project standard for exoneration is rigorously confined to cases where there is conclusive evidence of innocence established as a result of DNA testing. Email from Dr. Emily West, Research Director, Innocence Project, to Kathleen "Cookie" Ridolfi, Professor of Law, Santa Clara University School of Law (Jan. 27, 2014) (on file with recipient).

6. West, *supra* note 2, at 4-5.

7. *Connick v. Thompson*, 563 U.S. ___, 131 S. Ct. 1350, 1371 (Ginsburg, J., dissenting) (2011).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1372.

12. *Id.*

13. *Id.* at 1372-74.

14. *Id.*

15. *Id.* at 1356, 1375; The Innocence Project, *Holding Prosecutors Accountable*, http://www.innocenceproject.org/Content/Holding_Prosecutors_Accountable.php.

16. *Connick* at 1375.

17. *Id.* After the trial court vacated the carjacking conviction, the District Attorney's Office initiated grand jury proceedings to investigate the non-disclosure of the lab report on the blood. *Id.* However, the District Attorney terminated these proceedings after just one day, based upon the spurious reasoning that "the lab report would not be *Brady* material if the prosecutors did not know Thompson's blood type." *Id.*

18. *Id.*

19. *Id.* at 1357 (citing *State v. Thompson*, 825 So.2d 552 (La. App. 4 Cir. 2002)).

20. *Id.* at 1376.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See generally In re Honorable Ken Anderson (A Court of Inquiry)*, Probable Cause Order, Cause No. 12-0420-K26 (26th Jud. Dist. Ct. Williamson Cty., TX, April 19. 2013) [hereinafter Probable Cause Order].

25. *Id. See* Chuck Lindell, *Lawyers Spar Over Documents in Anderson Inquiry*, AM. STATESMAN, Feb. 4, 2013, *available at* http://www.statesman.com/news/news/anderson-court-of-inquiry-set-to-begin/nWFRp/.

26. *Ex Parte Morton*, No. AP-76663 (Tex. Crim. App., Oct. 12, 2011).

27. *See generally* Probable Cause Order.

28. *Id.* at 3.

29. *Id.* at 3.

30. *Id.* at 5.

31. *Id.* at 6.

32. Brandi Grisson, *Mark Norwood Indicted in Second Austin Murder*, The Texas Tribune, Nov. 9, 2012, *available at* http://www.texastribune.org/2012/11/09/mark-norwood-faces-grand-jury-second-austin-murder/; *see also* Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder*, Texas Monthly, March 27, 2013, *available at* http://www.texasmonthly.com/story/mark-alan-norwood-found-guilty-christine-mortons-murder.

33. Brandi Grisson, *Exonerated in Killing of Wife, a Father Renews Ties With Son*, The Texas Tribune, July 7, 2012, *available at* http://www.nytimes.com/2012/07/08/us/exonerated-in-wifes-killing-father-renews-bonds-with-son.html.

34. Chuck Lindell, *Lawyers Spar Over Documents in Anderson Inquiry*, AM. STATESMAN, Feb. 4, 2013, *available at* http://www.statesman.com/news/news/anderson-court-of-inquiry-set-to-begin/nWFRp/.

35. Probable Cause Order at 13.

36. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, *In re Special Proceedings*, Case No. 09-0198 at 2 (D.D.C. March 15, 2012) [hereinafter Schuelke Report].

37. Memorandum Opinion, *In re Special Proceedings*, Case No. 09-0198 at 2-3 (D.D.C. Feb. 8, 2012) [hereinafter Sullivan Order].

38. It is noteworthy that the prosecution, which was eventually determined to be flawed and rife with misconduct, was conducted by the Justice Department at a time when the same political party as Sen. Stevens led the Executive Branch, underscoring that the problem of withholding favorable information is institutional in nature.

39. *See generally* Schuelke Report; *see also* Sullivan Order at 54.

40. Schuelke Report at 4, 390-91, 393, 395-96.

41. *Id.* at 5, 497.

42. *Id.* at 6-9, 28, 38, 107-08, 122-25, 500.

43. *Id.* at 1, 32.

44. *See* Statement of Attorney General Eric Holder Regarding *United States v. Theodore F. Stevens*, Department of Justice (April 1, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-ag-288.html. *See also* Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator Stevens*, WASH. POST, April 2, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040100763.html ("Holder assigned a team of top department lawyers to review the case" and "he made the decision [to dismiss the indictment] after a thorough review of the evidence." In particular, the "discovery [of notes contradicting testimony of a key witness] by a fresh team of lawyers and their acknowledgment that the material should have been shared with Stevens' defense team led Holder to conclude [the case] could not be salvaged."); Nina Totenberg, *Justice Dept. Seeks to Void Stevens' Conviction*, NPR, April 1, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=102589818 (Holder decided to drop the case "rather than continue to defend the conviction in the face of persistent problems stemming from the actions of prosecutors" and the "straw that apparently broke Holder's back" was the discovery of more undisclosed prosecutorial notes "by the new prosecution team, which was appointed in February.").

45. Schuelke Report at 12.

46. Sullivan Order at 54.

47. As used in this report, the phrase "Study Sample" refers to the complete set of 1,497 federal court decisions analyzed by NACDL and the VERITAS Initiative researchers for this study. Appendix A, containing the Methodology and Guidance Document, provides a detailed explanation of the criteria and methodology used to identify this set of decisions.

48. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

49. *Id.* at 85.

50. *Id.* at 88.

51. Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. Rev. 74, 77 (2013); *See also* Irwin H. Schwartz, *Beyond* Brady*: Using Model 3.8(d) in Federal Court for Discovery of Exculpatory Information*, The Champion, March 2010, at 34 ("*Brady* is applied retrospectively. '[T]here is never a real "*Brady* violation" unless nondisclosure was so serious' that a post-trial review leads judges to conclude that it undermined their confidence in the verdict.") (alteration in the original) (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)).

52. Favorable information includes exculpatory as well as impeachment information. *See supra* note 3; *see also* Peter Goldberger, *Codifying the* Brady *Rule*, The Champion, May 2013, at 9 ("The *Brady* majority itself never used the term 'exculpatory' to describe the limits of its concern. Instead, it referred to material which 'would *tend to* exculpate [the accused] or *reduce the penalty*,' using the term 'favorable' three times to capture the essential characteristic of the covered material.") (italics and alteration in the original).

53. *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

54. *Strickler*, 527 U.S. at 289 (internal quotation marks omitted); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining a "reasonable probability" to be "a probability sufficient to undermine confidence in the outcome"). For the purposes of discussion, this report refers to this articulation as the *Bagley* standard.

55. *Strickler*, 527 U.S. at 289-90; *see also Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). For the purposes of discussion, this report refers to this articulation as the *Kyles* standard.

56. These alternative articulations used such phrases as "reasonable doubt," "significant chance of reasonable doubt," "reasonable likelihood," "reasonable possibility," and a "different view of the testimony." *See Banks v. Thaler*, 583 F.3d 295, 311 (5th Cir. 2009) ("[A] materiality showing does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in acquittal[.]") (citing *Kyles*, 514 U.S. at 434-46); *Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003) ("We also consider 'whether there was a significant chance that this added item, developed by skilled counsel … could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'") (quoting *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975)); *accord. Ogden v. Wolff*, 522 F.2d 816, 822 (8th Cir. 1975) (citing *Shulder v. Wainwright*, 491 F.2d 1213, 1223 (5th Cir. 1974) (quoting *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969))); *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001) ("In this sentence, the Court appears to be using the word 'material' in its evidentiary sense, *i.e.*, evidence that has some probative tendency to preclude a finding of guilt of lessen punishment, *cf.* Fed. R. Evid. 401. Thirteen years later, however, in *United States v. Agurs*, 427 U.S. 97, [] (1976), the Court began a process that would result in the word 'material' in the *Brady* context having an entirely different meaning.") (footnote omitted); *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) ("[T]here is a reasonable probability that had the evidence been disclosed to the defense, one or more members of the jury could have viewed [the witness's] testimony differently."); *United States v. Gardner*, 611 F.2d 770, 774 (9th Cir. 1980) ("In a case in which a general request for exculpatory evidence is made, the test for materiality is whether the suppressed evidence 'creates a reasonable doubt that did not otherwise exist.'") (quoting *Agurs*, 427 U.S. at 112); *United States v. Aguiar*, 610 F.2d 1296, 1305 (5th Cir. 1980) ("Assuming that appellants have established [a suppression by the prosecution after a request by the defense], they have not shown [the evidence's favorable character for the defense] and [the materiality of the evidence] because there is no reasonable likelihood that 'the suppressed evidence might have affected the outcome of the trial.'") (quoting *Agurs*, 427 U.S. at 104); *Lutes v. Ricks*, 2005 WL 2180467 at *16 (N.D.N.Y. 2005) ("[T]here is no reasonable possibility that had the evidence been disclosed, the result would have been different.") (internal quotation marks and citations omitted). In addition, when articulating the materiality standard, some courts specifically stated what the standard is not; it is not a "preponderance of the evidence" standard and the term "material" is not synonymous with the Federal Rules of Evidence definition.

57. Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 Loy. L.A. L. Rev. 77, 113-14 (2012) (discussing the creation and evolution of the *Brady* doctrine) (internal quotation marks and citations omitted).

58. Scott Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643 (2002).

59. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). "Justice Douglas's constitutional analysis relied on a line of due process cases involving prosecutors soliciting or willfully failing to correct false evidence and a quote inscribed on a wall in the Department of Justice. The cases, *Mooney v. Holohan*, *Pyle v. Kansas*, and *Napue v. Illinois*, had set a low floor for fairness at trial, finding a due process violation only when the state 'knowingly use[d] false evidence . . . to obtain a conviction.' The inscribed quote taught that '[t]he United States wins its point whenever justice is done its citizens in the courts.'" Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury,* 82 N.Y.U. L. Rev. 1780, 1788-89 (2007).

60. *Brady*, 373 U.S. at 87.

61. In 1977, in *Weatherford v. Bursey*, the Supreme Court clarified that, while *Brady* provides an avenue for discovery, there is no constitutional right to discovery in a criminal case. 429 U.S. 545, 559 ("It does not follow from the prohibition against concealing evidence

favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote, 'the Due Process Clause has little say regarding the amount of discovery which the parties must be afforded.'") (quoting *Wardium v. Oregon*, 412 U.S. 470, 474 (1963)).

62. *See United States v. Agurs*, 427 U.S. 97, 111 (1976) (reasoning that "there are situations in which evidence is obviously of such substantial value to the defense that elemental fairness requires it to be disclosed even without a specific request[]" because the prosecutor "is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, Vol. 2: Adjudication 145 (4th ed. 2006).

63. *See United States v. Bagley*, 473 U.S. 667 (1985) (holding "[i]mpeachment evidence, [] as well as exculpatory evidence, falls within the *Brady* rule") (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) (reversing conviction where government failed to disclose information relevant to the credibility of one of its witnesses)); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

64. *Kyles*, 514 U.S. at 438-39 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

65. Sundby, *see supra* note 58, at 647.

66. In addition to narrowing the definition of materiality, in the decisions following *Brady v. Maryland*, courts have created a variety of arbitrary barriers to limit the application of the *Brady* rule. For example, *Brady* does not discuss the undisclosed information in terms of admissibility nor does it declare admissibility a precondition for a due process violation. Yet, "[s]everal courts have construed the *Brady* rule to require that, unless the evidence would be admissible, it need not be disclosed." Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 701 (2006) (citing *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *United States v. Derr*, 990 F.2d 1330, 1335-36 (D.C. Cir. 1993); *Zeigler v. Callahan*, 659 F.2d 254, 269 (1st Cir. 1981)). *See also Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (holding inadmissible information is "as a matter of law, 'immaterial' for *Brady* purposes."); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible."); *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) ("Inadmissible evidence is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome."). This admissibility rule not only ignores the role that inadmissible information can play in leading to admissible evidence, but it fails to acknowledge the fact that evidence may be inadmissible for some purposes but admissible for others or under certain exceptions.

In addition to this admissibility rule, courts frequently refuse to apply *Brady* to situations in which the defense could have obtained the undisclosed (or late disclosed) information through reasonable due diligence. Generally there are three variations of the so-called due diligence 'rule.' Specifically, courts may excuse non-disclosure when (1) the information at issue is "equally available to a diligent defendant[,]" (2) the information at issue is "known by the defendant himself and he could have or should have told his lawyers about it[,]" or (3) even if the information at issue "is in the exclusive control of the government, so long as the relevant facts are accessible to a diligent defendant." Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 154-56 (2012). Thus, even when the government knows that its key witness has a criminal record and fails to disclose this fact to the defense, if the defense could have discovered the criminal record through a search of public records, the trend now is for the court to rely on the due diligence rule to avoid finding *Brady* violated. In sum, courts apply the due diligence rule "not just to situations where the defendant had actual knowledge, but also to situations where the defendant could have obtained the knowledge through due diligence" and impute the knowledge of the defendant to defense counsel. *Id.* at 154; *see, e.g.*, *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) ("there is no suppression if the defendant knew of the information or had equal access to obtaining it"); *United States v. Zichittello*, 208 F.3d 72, 102 (2d Cir. 2000) ("Even if evidence is material and exculpatory, it is not suppressed by the government within the meaning of *Brady* if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.") (internal quotation marks and citations omitted); *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998) ("government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender"); *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997) (to state a *Brady* claim a defendant must demonstrate that "discovery of the allegedly favorable evidence was not the result of a lack of due diligence") (citations omitted); *Hoke*, 92 F.3d at 1355 ("The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant."); *United States v. Dimas*, 3 F.3d 1015, 1019 (7th Cir. 1993) (when "the defendants might have obtained the evidence themselves with reasonable diligence . . ., then the evidence was not 'suppressed' under *Brady* and they would have no claim"); *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' . . . or where the evidence is available to defendant from another source.") (citations omitted).

67. *Agurs*, 427 U.S. at 107 ("We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial

mandated by the Due Process Clause of the Fifth Amendment to the Constitution.").

68. *Id.*

69. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009). In her article advocating for a prophylactic rule to effectuate *Brady*, Professor Burke explains: "*Brady*'s progeny have made clear that prosecutors are not constitutionally obligated to disclose all exculpatory evidence, or even all relevant exculpatory evidence. In fact, the definition of 'material' exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense. Under *Brady*'s progeny, a prosecutor can constitutionally withhold all evidence, except for exculpatory evidence that 'creates a reasonable doubt that did not otherwise exist.'" *Id.*

70. The Court discussed this juxtaposition of duties in *Kyles v. Whitley*, stating: "We have never held that the Constitution demands an open file policy [], and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any information tending to exculpate or mitigate. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1984) ('A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused'); ABA Model Rule of Professional Conduct 3.8(d) (1984) ('The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense')." 514 U.S. 419, 437 (1995).

71. *Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.").

72. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

73. *Id.*

74. *Id.*

75. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009); *see also Agurs,* 427 U.S. at 108.

76. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 1 (2009). The ABA opinion explains that although the "obligation may overlap with a prosecutor's other legal obligations[,]" it would be "inaccurate" to describe this rule as merely "codifying" *Brady* and "incorrect" to assume it requires "no more from a prosecutor than compliance" with *Brady* and its progeny. *Id.* The text of Rule 3.8(d) does not contain a materiality requirement and a "review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law." *Id.* at 2. Notably, every state but California has adopted ABA Model Rule 3.8(d). *See* ABA, State Adoption of the ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.htm.

77. ABA Formal Opinion 09-454 at 4.

78. *Id.* at 2 (emphasis added).

79. *Id.* at 4 n.16 (citing *Cone*, 556 U.S. at 470 n.15; *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); Annotated Model Rules of Professional Conduct 375 (ABA 2007); 2 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* § 34-6 (3d 2001 & Supp. 2009); Peter A. Joy & Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* 145 (ABA 2009).

80. Memorandum from David W. Ogden, Deputy U.S. Att'y Gen, U.S. Dept. of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html [hereinafter Ogden Memo].

81. The Department of Justice Office of Legal Education has also published a "Federal Criminal Discovery Blue Book" for use by federal prosecutors. DOJ has declined, however, to make this guidance available to the public. In December 2012, NACDL filed a Freedom of Information Act (FOIA) lawsuit to obtain the guidance and is currently engaged in litigation over the matter. DOJ has asserted that its policies regarding disclosure of favorable information are protected from public disclosure by attorney-client and work-product privileges. *See* Press Release, National Association of Criminal Defense Lawyers, DOJ Opposes Legislating Discovery Reform, but Declines to Disclose Its Own Federal Criminal Discovery Blue Book; Nation's Criminal Defense Bar Filed Federal Suit Today (Feb. 21, 2014) (http://www.nacdl.org/NewsReleases.aspx?id=31999).

82. Following the release of the Ogden Memo, one commentator wrote: "Consistent with *Bagley*, [DOJ's] guidance has required, and continues to require, some degree of materiality." Gil Soffer, *Recent Changes in DOJ Discovery Policies: The Ogden Memo*, 2011 WL 190331 *5 (2011). Further, Soffer explains that "[t]he department's newest guidance does not address materiality head-on, but in prescribing more rigorous methods for the collection, review, and production of exculpatory and impeaching information, the department doubtless hopes to forestall demands for changes to Rule 16 [of the Federal Rules of Criminal Procedure to expand the government's disclosure obligations.]" *Id.* at *4-5; *see* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1336-37 (2011) (Under the U.S. Attorney's

Manual, "the DOJ adheres to the materiality standard[]" and "federal prosecutors are likely to continue to adhere to the [manual] when in conflict with the ABA Criminal Justice Standards until courts decide otherwise.").

83. U.S. Dep't of Justice, United States Attorneys' Manual 9-5.001 (updated June 2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm [hereinafter USAM 9-5.001].

84. *Id.* In addition, the Ogden Memo sets forth the following considerations regarding the scope and timing of disclosures:

> Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery *consistent with any countervailing considerations*. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, *prosecutors should always consider any appropriate countervailing concerns in the particular case*, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and *other strategic considerations that enhance the likelihood of achieving a just result in a particular case*.

Ogden Memo at Step 3, Part A (emphasis added).

85. USAM 9-5.001, *supra* note 83.

86. The ambiguity raised by this judicial double-speak and the difficulty applying the materiality standard pre-trial inspired a number of federal courts to conclude that the *Brady* materiality standard is unworkable in the trial context. For example, in *United States v. Safavian*, a case that arose out of the Jack Abramoff scandal, Federal District Court Judge Paul L. Friedman characterized the materiality standard as requiring the trial court to "look at the case through the end of a telescope an appellate court would use post-trial," and concluded that the materiality standard is unworkable in the trial context. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). Further, Judge Friedman stated that the "only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *Id.* (citing *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); also citing *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D.Nev. 2005), and appended magistrate judge's decision, 357 F. Supp. 2d at 1237; *United States v. Carter*, 313 F. Supp. 2d 921, 924-25 (E.D. Wis. 2004)). In the end, the court ordered the government to disclose all favorable information before trial. *Id.* 20-21.

Similarly, in *United States v. Sudikoff,* the court concluded that, because it was unable to determine whether the information the government was trying to withhold would create a reasonable probability of a different outcome at trial, "[the materiality] standard is only appropriate, and thus applicable, in the context of appellate review." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999). Rather than wrestle further with the materiality standard, the *Sudikoff* court ordered the government to disclose all favorable information before trial. *Id.* at 1206.

Finally, the idea that pre-trial discovery requires broad disclosure of favorable information is a position taken by many, but not all, courts. *See, e.g., United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001); *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991); *United States v. Mannarino*, 850 F. Supp. 57 (D. Mass 1994).

87. A detailed description of the methodology is available at Appendix A — Methodology [hereinafter Methodology Appendix].

88. As used in this report, the phrase "Research Team" refers to the group of individuals who developed and executed the study discussed in this report. This group includes VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, VERITAS Initiative Pro Bono Research Attorneys Todd Fries and Jessica Seargeant, and six law student volunteers from the Santa Clara University School of Law. The phrase "Project Supervisors" refers to Ridolfi, Joslyn, and Fries.

89. The Study Sample included only decisions made by federal courts. However, these decisions resolved *Brady* claims from cases that originated in both federal and state courts. Those decisions originating in state courts generally reached the federal courts through a petition for a writ of *habeas corpus*. *See* 28 U.S.C. § 2254.

90. As discussed in the Methodology Appendix, only those decisions that resolve a *Brady* claim on its merits were subjected to extensive analysis. If a court discards the *Brady* claim on procedural grounds, then the decision was coded as "non-merits" and no further analysis or coding was conducted for it.

91. The Guidance Document is part of the Methodology Appendix.

92. As the Supreme Court has explained, with "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions [] the result of guilty pleas," the criminal system "'is for the most part a system of pleas, not a system of trials.'" *Missouri v. Frye*, 566 U.S. ___,

132 S. Ct. 1399, 1407 (2012) (quoting *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1378 (2012)). As a result, the Court recognized that "[i]n today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id. See also* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 CRIM. L. & CRIMINOLOGY 1, 13 (2013) ("[Today] over 96% of convictions in the federal system result from pleas of guilt rather than decisions by juries.").

93. For additional explanation of the difference between a decision that resolves a *Brady* claim on the merits and a decision that does not, see the Methodology Appendix.

94. In 1996, AEDPA altered 28 U.S.C. § 2254 and set a new "standard of review" for habeas relief in prosecutions originating in state courts. Under AEDPA, the federal habeas court determines whether the state court's finding was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or that it was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." De novo is the standard of review for *habeas* claims that originate in federal court. *See United States v. Espaillet,* 380 F.3d 713, 718 (2d Cir. 2004); *Owens v. United States,* 483 F.3d 48, 57 (1st Cir. 2007); *Parsley v. United States,* 604 F.3d 667, 671 (1st Cir. 2010); *United States v. Infante,* 404 F.3d 376, 386 (5th Cir. 2005); *United States v. Blanco,* 392 F.3d 382, 387 (9th Cir. 2004).

95. Procedural postures in the "other" category include: an application for a stay and abeyance of *habeas* proceedings; a petition for a writ of *coram nobis*; and an application for a certificate of appealability.

96. The Research Team only looked at the representation type for the specific proceeding resolved by the decision included in the Study Sample — *i.e.*, these numbers do not speak to the type of representation at the time of plea or conviction.

97. Information in the "other" category includes, for example, the identity of a particular person, information concerning the government's trial strategy and intended witnesses, and unspecified assertions such as "everything the prosecutor knows."

98. As discussed above, the totals for the information form exceed 620 because 176 decisions involve multiple forms of information. Of the 176 decisions involving multiple forms of information, 48 involve physical information, 112 involve statement or testimony information, 143 involve documentary information, 40 involve incentive or deal information, and 50 involve information categorized as "other."

99. Although a number of decisions involved multiple *Brady* claims, researchers coded and analyzed only one *Brady* claim per decision—the claim that was the central focus of the court's decision.

100. Of the 22 *Brady* violation decisions identified in the Study, only one was a *pro se* decision, despite the fact that *pro se* decisions represented 54 percent of the Study sample.

101. As detailed in the Methodology Appendix, the Research Team coded a decision as one involving favorable information only when the court explicitly states that the information is "favorable," the court implies the information is favorable by acknowledging its exculpatory or impeaching value, or when the Research Team could make such a determination based on a reasonable reading of the facts. Decisions are not coded as favorable if the information does not exist, if there is insufficient detail about the information to make such a determination, or if the claim is not relevant or is frivolous. As a result, the quantity of decisions coded as favorable is conservative and may be understated.

102. For the purposes of this report, the phrase "undisclosed favorable information" refers to information that the Research Team determined to be favorable, in accord with the Guidance Document contained in the Methodology Appendix, and not disclosed to the defense. *See id.* (discussing the method for determining the number of decisions involving favorable information). Undisclosed favorable information is not information that the government actually disclosed or disclosed in an untimely fashion.

103. *See supra* notes 54 and 55 (providing *Bagley* and *Kyles* standards).

104. The facts, quotations, and any other information used in this decision comparison come from *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011), and *United States v. Kott*, No. 3:07-CR-056, 2010 WL 148447 (D.C. Alaska 2010), *vacated*, *United States v. Kott*, 423 F. App'x 736 (9th Cir. 2011).

105. Bill Allen, the government's key witness in both the Kott and Kohring prosecutions, was also the government's key witness in the prosecution of Senator Stevens discussed in the introduction of this report. *See supra* Section I.

106. The facts, quotations, and any other information used in this decision comparison come from *Willis v. Howes*, No. 2:02-CV-72436, 2010 WL 7645642 (E.D. Mich. 2010), *adopted by*, No. 02-CV-72436, 2011 WL 4504739 (E.D. Mich. 2011), and *United States v. McDuffie*, 454 F. App'x 624 (9th Cir. 2011).

107. *Kohring*, 637 F.3d 895.

108. *Kott*, 2010 WL 148447.

109. In Stevens, the U.S. District Court for the District of Columbia vacated the conviction upon the request of the government after the *Brady* violations came to light. Whereas in both Kott and Kohring, following the revelations in the Stevens case, the government opposed dismissal and the U.S. District Court for the District of Alaska rejected the defendants' *Brady* claims. As a result, Kott and Kohring appealed

the district court's decisions to the U.S. Court of Appeals for the Ninth Circuit, which reversed the district court, vacated their convictions, and remanded both cases for new trials.

110. Ultimately the decision to dismiss the indictment against Sen. Stevens came from U.S. Attorney General Eric Holder following a review of the case by a new team of Department of Justice lawyers. *See supra* note 44.

111. *Kohring*, 637 F.3d at 900; *Kott*, 2010 WL 148447, at *2.

112. *Kohring*, 637 F.3d at 900.

113. This study identified all federal court decisions citing *Brady v. Maryland* during a set five-year time period, but only included a portion of those decisions, selected at random, in the Study Sample. As a result, the Study Sample included only the decision of the Ninth Circuit in *Kohring* and the decision of the U.S. District Court for the District of Alaska in *Kott*. Ultimately, Kott appealed the Alaska District Court's decision to the Ninth Circuit and, citing *Kohring*, it reversed the district court. *See United States v. Kott*, 423 F. App'x 736, 737 (9th Cir. 2011). The Ninth Circuit decision in *Kott*, however, was not included in the study's random sample. Despite the identical procedural history of these two cases — a ruling for the government at the district court level and a reversal in favor of the defendant at the circuit court level — the inclusion in the Study Sample of the conflicting circuit and district court decisions, based on nearly identical facts, serves to demonstrate the unpredictability of the materiality standard.

114. The *Stevens* indictment was dismissed in April 2009 and the Ninth Circuit vacated Kott's conviction in January 2010 and Kohring's conviction in March 2011. *See supra* notes 44, 104, 113.

115. *See supra note* 113 (explaining how the decisions from these two different courts, in cases that followed identical procedural paths, were included in the Study Sample).

116. As detailed in the Guidance Document contained in the Methodology Appendix, the Research Team coded a decision as involving favorable information only when the court expressly found the information to be favorable or implied the information to be favorable by acknowledging its exculpatory or impeaching value or when the Research Team could make such a determination based on a reasonable reading of the facts. Decisions were not coded as favorable if the information did not exist, if there was insufficient detail about the information to make such a determination, or if the claim was not relevant or was frivolous. As a result, the quantity of decisions coded as favorable is conservative and may be understated.

117. As discussed in Section VI, when the Research Team includes decisions involving the late disclosure of favorable information, this number jumps to 210 decisions and, of those 210 decisions, the court found the information not material in 188 — *i.e.*, 90 percent of these decisions.

118. Dissenting in *United States v. Bagley*, Justices Marshall and Brennan explained, "the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pre-trial standard that virtually defies definition." 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

119. *See* The Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (proposed legislation effectively prohibiting the government from using the *Brady* materiality requirement to narrow its disclosure obligation by requiring prosecutors to disclose all information "that may reasonably appear favorable to the defendant" and appellate courts to employ a "harmless [] beyond a reasonable doubt" standard of review for disclosure violation claims). For additional discussion of S. 2197 and other reforms, see *infra* Section IX.

120. Rejecting the use of *Brady*'s materiality standard for determining the government's pre-trial disclosure obligations, U.S. District Court Judge Harry Pregerson explained, "[the materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material. This analysis obviously cannot be applied by a trial court facing a pretrial discovery request." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999). *See also* discussion *supra* note 86.

121. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

122. Keith A. Findley, *Tunnel Vision* 6, Univ. of Wisconsin Legal Studies Research Paper No. 1116, *in Conviction of the Innocent: Lessons From Psychological Research* (B. Cutler, ed., 2010), *available at* http://ssrn.com/abstract=1604658. *See generally* Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, The Champion, May 2013 at 12; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. of Gen. Psychol. 175 (1998); Yaacov Trope & Nira Liberman, Social Hypothesis-testing: Cognitive and Motivational Mechanisms, in Social psychology: Handbook of Basic Principles (E.T. Higgins & A.W. Kruglanski, eds.) (1996); Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980).

123. Burke, *supra* note 69, at 495.

124. John Grisham, The Innocent Man: Murder and Injustice in a Small Town 288 (2006).

125. *Id.* at 302.

126. Sundby, *supra* note 58, at 656.

127. *See* Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986).

128. The phrase "open file discovery" refers to a system in which the prosecution gathers all the information in the case, places it in a file, and then makes the file available to the defense prior to trial. The system may be a statutory mandate or merely an office policy, and thus the precise contours of case file content and defense access can differ substantially. Implicit in any open file system, however, is an obligation to ensure that the file is complete — *i.e.*, the prosecutor has an affirmative duty to seek out all relevant information from all those involved in the investigation and prosecution *and* place it in the file.

For offices with an open file policy, "the definitions vary considerably." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 939 n.167 (2012). One office "might invite defense counsel to view all information gathered in a case, while another office may simply give the defense substantial, but not total, access to its files. Some may have little in the file thus the term 'open file' does not provide meaningful access to information." *Id.* (internal citation omitted). Open file discovery should eliminate or at least minimize gamesmanship, but "even under the most expansive open file policy, prosecutors typically make a distinction between what is required under discovery rules, and what is required under *Brady*, disclosing the former but not the latter." Bennett L. Gershman, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the* Brady *Rule in the Modern Criminal Justice System*, 57 CASE W. RES. L. REV. 531, 543 n.67-70 (2007). *See also* Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1561-63 (discussing various ways prosecutors and law enforcement can evade fair disclosure in an open file system).

On the other hand, statutory mandates provide clear guidance and are "short and simple." Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1372. For example, in a "full open file discovery" system, like that adopted by North Carolina, the prosecutor must obtain "all information about the case from police and all agencies involved" and disclose "all case-related information to the defense [with narrow exceptions]." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS at 939. In addition, the statute specifically requires disclosure of "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation [or prosecution,]" provides an extensive definition of the term "file," and, with some exceptions, requires all oral statements to be in "written or recorded form." N.C. GEN. STAT. § 15A-903(a)(1); *see* Yaroshefsky at n.169 ("The combination of provisions in the North Carolina statutes qualify North Carolina's reform as 'full' open file discovery.").

129. Fred Klein, *A View From Inside the Ropes: A Prosecutor's Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 869 (2010).

130. *United States v. Bagley*, 473 U.S. 667, 702 (1985).

131. The phrase "late disclosure" covers a wide range of time, from shortly before trial and during trial, to long after conviction.

132. This group does not include any decision involving information that is not favorable. *See id.*

133. Late disclosure decisions are only those decisions involving the late disclosure of *favorable* information — *i.e.*, favorable information decisions involving a late disclosure. If the decision involves the late disclosure of information that is not favorable, then the decision is not included in the late disclosure decision total. *See supra* note 116 (defining "favorable information decision" and explaining the methodology used to evaluate favorability).

134. The breakdown of the time of late disclosure adds up to more than 65 because a number of these decisions included late disclosure of multiple pieces of information at different times during the proceeding.

135. In 2004, the Judicial Conference Advisory Committee on Rules of Criminal Procedure (JCAC) published a comprehensive study of federal and state court rules that addressed the disclosure obligations set out in *Brady v. Maryland*. The JCAC was able to obtain rules and procedures for 30 of the 94 United States federal districts and quantified what it found. Regarding timetables for disclosure of *Brady* material, JCAC found that the federal districts varied significantly but all required disclosure before trial. The most common time frame permitted disclosure "within 14 days of arraignment" followed by "within five days of arraignment." For districts without specified time requirements, timing was characterized as "as soon as reasonably possible," "before the trial," or "after defense counsel has entered an appearance." These rules apply to all information favorable to the defendant with the exception of witness statements governed by the Jencks Act. *See* Laurel L. Hooper, Jennifer E. Marsh & Brian Yeh, Fed. Judicial Ctr., Treatment of *Brady v. Maryland* Material in United States District and State Courts' Rules, Orders, and Policies: Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (2004).

136. According to the JCAC study, when assessing the timing of *Brady* material disclosures, there is a wider disparity among states than there is among federal districts. *See id.* at 23-26. Times range from "[w]ithin 10 calendar days after arraignment" to "[n]ot later than 7 days prior to trial." *Id.* Some states rely on undefined terms such as "timely disclosure" or "as soon as practicable," which have been interpreted to mean "within a sufficient time for its effective use" by the defendant. *Id.* (internal quotation marks omitted). State courts have emphasized that disclosure must not constitute "unfair surprise." *Id.*

137. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009).

138. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1984).

139. *See* Schwartz, *supra* note 51, at 34 (discussion of using Model Rule 3.8(d) as a tool for expanding discovery rights).

140. *See supra* Section II, at 8-9.

141. Despite the harm late disclosure causes for the defense, judicial tolerance is justified in some limited circumstances. For example, late disclosure may be justified when a prosecutor does not gain possession of information until late into the investigatory process or during the trial itself. Absent intentional avoidance of knowledge or possession of the information, when a prosecutor without fault is unable to provide more timely disclosure, tolerance is understandable. In addition, judicial tolerance is mandated when the delay is based on the Jencks Act, a federal rule allowing federal prosecutors to disclose witness statements *after* they testify. 18 U.S.C. § 3500 (1994) (prohibiting federal courts from ordering disclosure of witness statements until after the witness has testified).

Congress enacted the Jencks Act in response to a 1957 Supreme Court decision holding that the defendant is entitled to production of "relevant statements or reports ... of government witnesses touching the subject matter of their testimony at trial." *Jencks v. United States*, 353 U.S. 657, 672 (1957); *see* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 Ga. St. U. L. Rev. 651, 653 (1999) (citing S. Rep. No. 85-981 (1957)). Although the Court did not state when the prosecution must disclose the statements, the decision was met with significant criticism, much of which resulting "from court decisions that read Jencks liberally." *Id.* Taking the position "that misapplication of the *Jencks* doctrine can mean an irretrievable loss to the government's case[,]" Congress drafted the Jencks Act with the intent to "protect[] the files of the FBI and of the government from danger of the disclosure of irrelevant and incompetent matter, as well as any matters which are within a valid exclusionary rule." S. Rep. 85-981 at 1862 (1957). The result is a statement, in no uncertain terms, that courts cannot afford the defense access to, or even inspection of, a statement made by a witness "until said witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a).

When statements contain favorable information, the rigid dictate of the Jencks Act can conflict with *Brady*'s requirement that information be disclosed in time for the defense to use it effectively. *See infra* note 154 (discussing the judicial standard for excusable late disclosure). All courts agree that *Brady* material contained within Jencks material must be disclosed, but there is no consensus on whether *Brady* supersedes Jencks' timing provisions. *See* Federal Judicial Center, Benchbook for U.S. District Court Judges at 174-75 (6th ed. March 2013), *available at* http://news.uscourts.gov/updated-edition-benchbook-now-available. "[C]ircuits are split about which law trumps when they conflict" and the "split comes down to a disagreement about how much time the defense needs to use exculpatory evidence effectively." Cara Spencer, *Prosecutorial Disclosure Timing: Does* Brady *Trump the Jencks Act?*, 26 Geo. J. Legal Ethics 997, 998, 1004 (2013) ("some courts find[] that the later disclosure on the Jencks Act's terms always conforms to *Brady*, and others finding that *Brady* sometimes or even generally requires earlier disclosure than the Jencks Act permits."). Whereas prosecutors already exercise broad discretion over what to disclose, the Jencks Act further insulates the exercise of that discretion "because it explicitly forbids courts from ordering disclosure of witness statements until relatively late in the trial." *Id.* at 1000. For the defendant, this further diminishes access and impairs the ability to prepare an effective defense strategy.

142. *Jackson v. Senkowski*, No. 03 Civ. 2737, 2012 WL 3079192 (S.D.N.Y. July 30, 2012).

143. *Id.* at *6-7 (citing *People v. Jackson*, 264 A.D.2d 683, 683-84 (N.Y. App. Div. 1999) (citing *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y.A.D.2d 1995) (setting forth the facts underlying Jackson's *Brady* claim in detail))).

144. *Id.* at *6.

145. *Id.* at *7.

146. *See also United States v. Qunbar,* No. 07-3515-cr, 2009 WL 1874339 (2d Cir. 2009) (late disclosure of electronic database diminishes the value of the information to the detriment of the defense).

147. *Chinn v. Warden of Mansfield Corr. Inst.*, No. 3:02-cv-512, 2011 WL 5338973 (S.D. Ohio Oct. 14, 2011).

148. *Id.* at *71.

149. *Id.* at *70.

150. *Id.*

151. *Id.* at *71.

152. *See United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985); *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984).

153. For example, of the 65 late disclosure decisions identified within the Study Sample, only one resulted in a *Brady* violation finding.

154. "The Supreme Court has never expressly held that evidence that is turned over to the defense during trial has been 'suppressed' within the meaning of *Brady*." *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008). As a result, circuit courts tend to excuse late disclosure so long as the defendant was able to use the evidence or information effectively at trial. *See id.* at 336 ("We have held that a defendant is not prejudiced if the evidence is received in time for its effective use at trial.") (citations omitted). *See also United States v. Ross*, 703 F.3d 856, 881 (6th Cir. 2012) ("*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to complete failure to disclose.

... [E]ven tardy disclosures of *Brady* material do not violate the defendant's constitutional rights unless he can demonstrate the delay denied him a constitutionally fair trial.") (internal quotation marks and citations omitted); *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011) ("there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value) (citations omitted); *United States v. Celis*, 608 F.3d 818, 836 (D.C. Cir. 2010) ("the critical point is that disclosure must occur in sufficient time for defense counsel to be able to make effective use of the disclosed evidence") (citations omitted); *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) ("the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously," that is, "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial"); *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005) ("Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial.") (citations omitted); *United States v. Perez-Ruiz*, 353 F.3d 1, 8 (1st Cir. 2003) ("When *Brady* or *Giglio* material surfaces belatedly, 'the critical inquiry is not why disclosure was delayed but whether the tardiness prevented defense counsel from employing the material to good effect.") (citations omitted).

155. While a prosecutor must disclose information that would establish that a defendant was innocent prior to acceptance of a guilty plea, in order to ensure that those factually innocent of crimes do not nonetheless plead guilty, the "Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz,* 536 U.S. 622, 631, 633 (2002).

156. In a study of the first 200 DNA exoneration cases, Prof. Brandon Garrett identified nine cases in which the defendant pled guilty and was later exonerated. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008). *See also* Brandon L. Garrett, *Convicting the Innocence: Where Criminal Prosecutions Go Wrong* 169, 200-03 (2011) (defendants in 29 of the first 250 DNA exoneration cases raised *Brady* claims).

157. Judge Lee Sarokin, *Why Do Innocent People Plead Guilty?*, HUFFINGTON POST (May 29, 2012), http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas_b_1553239.html.

158. *See United States v. Mordi*, 277 F. App'x 613, 617 (7th Cir. 2008) ("Although Mordi complains mightily about material disclosed shortly before the original trial date, he cannot plausibly argue that those disclosures hindered his trial preparation because the district court gave him a one-month continuance."); *United States v. Navarro*, 263 F. App'x 428, 429 (5th Cir. 2008) ("Cuevas was granted a continuance during trial to determine whether [the witness] had been convicted of murder in Mexico. … Because Cuevas had time to investigate and put the information to effective use at trial, he was not prejudiced by the late disclosure of [the witness's] criminal history, and there is no *Brady* violation.") (internal citations omitted).

159. *United States v. Rittweger*, 309 F. App'x 504, 506 (2d Cir. 2009) ("We have previously stated that the failure to ask for a continuance when allegedly new evidence is introduced at trial is, if not a waiver of any later unfair surprise claim, at least strong proof that the party was not in fact surprised by the 'new' evidence.") (citing *United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991) ("If [the defendant was] truly surprised by the testimony, he could have sought time to prepare his cross-examination and/or answering case."); *United States v. Caine*, 441 F.2d 454, 456 (2d Cir. 1971) ("[T]he absence of surprise is highlighted by appellants' failure to request a continuance when the court ruled the evidence admissible.")).

160. Within the Study Sample, there is a correlation between late disclosure decisions and statements. Statements are overrepresented in late disclosure decisions. (*Chi Square* statistic .070).

161. The Jencks Act is a federal statute that allows disclosure of witness statements only *after* the witness testifies. *See supra* note 141.

162. A total of 32 late disclosure decisions involved statements. Of those decisions, nine originated in federal court and 23 originated in state court. The discovery rules in the majority of these 23 state-originated decisions do not follow the Jencks Act and require disclosure of witness statements pre-trial.

163. Late disclosure may be justified when providing the witness statement could put the witness in danger. Any risk of danger can be averted, however, on a case-by-case basis through judicial *in camera* review of the statement and a remedy tailored to the particular facts, such as "attorney's eyes only" disclosure, a redacted disclosure, or some other limiting order from the judge.

164. *See, e.g. United States ex rel. Young v. McCann*, No. 07 C 1100, 2007 WL 2915634 (N.D. Ill. Oct. 5, 2007) (witness recantation disclosed during trial); *Gardner v. Fisher*, 556 F. Supp. 2d 183, 188 (E.D.N.Y. 2008) (police report of interview with witness disclosed during trial); *Quinones v. Rubenstein*, Civ. No. 5:06-cv-00072, 2009 WL 899428, at *30 (S.D. W.Va. March 26, 2009) (57-page witness statement turned over on first day of trial); *Ennis v. Kirkpatrick*, No. 10 Civ. 4023(PKC), 2011 WL 2555994, at *1 (S.D.N.Y. June 27, 2011) (witness statement exculpating defendant turned over during trial); *Colbert v. Minnesota*, No. 06-4407, 2007 WL 4224214 at *3 (D. Minn. Nov. 28, 2007) (expert witness statement that coat on videotape did not match defendant's coat turned over after expert testified); *Parson v. Keith*, No. CIV-07-994-M, 2008 WL 2568385 (W.D. Okla. June 24, 2008) (exculpatory statements by victim and witness disclosed during trial), *cert. denied*, 310 F. App'x 271 (10th Cir. 2009); *Collins v. Shewalter*, No. 1:09CV2427, 2010 WL 3603147, at *6-*7 (N.D. Ohio July 7, 2010)

(police report containing witness statement provided after she testified); *Stitt v. Yates*, No. 1:10-CV-01270, 2011 WL 533584, at *6 (E.D. Cal. Feb. 11, 2011) (photographic lineup disclosed during trial); *United States v. Barraza*, 655 F.3d 375, 380-1 (5th Cir. 2011) (witness inconsistent statement disclosed during trial); *Black v. Warden*, No. 05-cv-2187, 2009 WL 1220493, at *11-*12 (W.D. La. March 12, 2009) (police officer's prior false arrest affidavit disclosed after officer testified); *United States v. Qunbar*, 335 F. App'x 133, 135-36 (2d Cir. 2009) (income and expense database in tax fraud case disclosed four days into trial).

165. *See United States v. O'Keefe,* 128 F.3d 885, 898 (5th Cir.1997); *United States v. Smith Grading & Paving, Inc.,* 760 F.2d 527, 532 (4th Cir.1985); *United States v. Starusko,* 729 F.2d 256, 262 (3d Cir. 1984). *See also supra* note 154 (discussing the judicial standard for what constitutes an excusable late disclosure).

166. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007); *see also* Gershman, *supra* note 127.

167. There are two generally accepted case precedents for the *Brady* defendant due diligence rule. In *Kyles v. Whitley,* 514 U.S. 419 (1995), and *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court articulated a variation of the *Brady* test that described information that was withheld as "unknown to the defense." This simple phrase has since been interpreted so as to impose a burden that if the defendant could have, should have, or actually did know about the undisclosed information, then the information could not have been "unknown to the defense." The prosecution therefore cannot be held accountable for not disclosing the information.

In *Kyles*, despite a specific discovery request by the defense, the prosecutor denied having information that was in her possession. In concluding that the prosecutor did not withhold the information, the Supreme Court said,

> showing that the prosecution knew of an item of favorable evidence *unknown to the defense* does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

514 U.S. at 437. This reference in *Kyles* is the only time the Supreme Court mentions that the information must be unknown to the defense. There is no mention of imposing a burden on the defendant to prove there was no other way he could have obtained the information.

Although the phrase "unknown to the defense" is not part of the *Brady* definition, this phrase has evolved into a rule being followed in every federal court of appeal with the exception of the Tenth and D.C. Circuits. Weisburg, *supra* note 66, at 143. Courts have taken this phrase to mean that "there is no *Brady* violation if the defendant knew or should have known about the evidence at the time of trial." *Id.* In addition, lower courts sometimes cite other criminal procedural due diligence requirements to justify a defendant due diligence requirement for an alleged *Brady* violation.

168. *Bell v. Bell*, 52 F.3d 223, 235 (6th Cir. 2008) (holding no violation of *Brady* where the sentencing records of a prosecution witness were publicly available and the witness "mentioned a pending charge as a reason for his incarceration" to the defendant while in jail together) (citing *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) ("Where, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.") (internal citation omitted)); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (There is no *Brady* violation where information is available to the defense "because in such cases there is really nothing for the government to disclose.").

169. *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (per curiam) (internal citations and quotation marks omitted).

170. *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011).

171. *Id.* at 476.

172. *Id.* at 475-76.

173. *Id.* at 476.

174. *Id.*

175. *Id.*

176. *Id.* at 479 (Cole, J., dissenting).

177. *Id.*

178. The due diligence rule emerged from an out-of-context phrase taken from *Kyles v. Whitley* and *United States v. Agurs*, two Supreme Court decisions. *See supra* note 167 (discussing the origin of the due diligence rule). *See also* Weisburd, *supra* note 66, at 142-143.

179. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule [] declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant due process.").

180. Weisburd, *supra* note 66, at 141.

181. *Id. See Tice v. Wilson,* 425 F. Supp. 2d 676, 696 (W.D. Pa. 2006).

182. Weisburd, *supra* note 66, at 142.

183. Weisburd, *supra* note 66, at 178.

184. Harmless error analysis refers to a doctrine of appellate review that analyzes whether evidence of guilt is so strong that error would not have made a difference in the outcome of the case. If the answer is yes, the conviction is allowed to stand, despite the error, which is deemed harmless.

185. *United States v. Agurs,* 427 U.S. 97, 116 (1976) (Marshall, J., dissenting).

186. *United States v. Bagley*, 473 U.S. 1, 18 (1999).

187. "[S]uch disclosure will serve to justify trust in the prosecutor as the representative ... of the sovereignty ... whose interest ... in a criminal prosecution is that it shall win a case, but that justice shall be done." *Kyles v. Whitley,* 514 U.S. 419, 439 (1995) (ellipses in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

188. *See, e.g.*, *Rhoades v. Henry*, 638 F.3d 1027, 1037 (9th Cir. 2011) (police reports documenting that a witness confessed to the crime multiple times); *Blalock v. Smith,* No. 08 Civ. 7528, 2012 WL 3283439 at *9 (S.D.N.Y. Aug. 13, 2012) (statements from a witness interview concerning the events involving the decedent prior to her death); *Simpson v. Warren,* 662 F. Supp. 2d 835 (E.D. Mich. 2009) (information that the police coerced two witnesses into making police statements about the events leading up to the assault); *United States v. Elso,* 364 Fed. App'x 595 (11th Cir. 2010) (government omitted from debriefing reports exculpatory statements of two witness, both of whom refused the defendant's pre-trial requests for interviews and invoked their Fifth Amendment privilege against self-incrimination at trial); *Vasquez v. Thaler,* Civ. No. SA-09-CA-930-XR, 2012 WL 2979035 (W.D. Tex. 2012) (statements by multiples witnesses that the defendant was not present at the motel the evening of the crime and a statement by one of the victims that he may have broken one of the assailant's fingers); *Roberson v. Quarterman,* No. 3-07-CV-0339-B, 2007 WL 4373267 (N.D. Tex. 2007) (statements by multiple witnesses that the defendant did not assault his daughter); *Jeffries v. Morgan,* Civ. No. 05-CV-66, 2009 WL 4891836 (E.D. Ky. 2009) (existence and contents of interview with another individual observed in the vicinity around the time of the crime); *Trevino v. Thaler,* No. 10-70004, 2011 WL 5554816 (5th Cir. 2011) (statements made by co-defendant who ultimately testified for the government).

189. *See, e.g.*, *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011) (information on defendant's self-destructive behavior while in police custody); *Franklin v. Bradshaw,* No. 3:04-cv-187, 2009 WL 649581 (S.D. Ohio March 9, 2009) (contents of notes produced by the defendant and the defendant's family history); *Rhoades v. Henry,* 638 F.3d 1027, 1040 (9th Cir. 2011) (fact that defendant invoked his right to silence en route to the police station).

190. *See, e.g.*, *Bethany v. Thaler,* No. 3:09-CV-288-N, 2011 WL 4544021 (N.D. Tex. Aug. 31, 2011); *Washington v. Brown,* No. 09-CV-544, 2009 WL 1605553 (E.D.N.Y. June 8, 2009); *Ford v. Carey,* No. CIV S-05-0944, 2009 WL 3806224 (E.D. Cal. Nov. 12, 2009).

191. *See, e.g.*, *United States v. Are,* 590 F.3d 499 (7th Cir. 2009); *Bozsik v. Bradshaw,* No. 1:03CV1625, 2010 WL 770223 (N.D. Ohio June 4, 2010); *Bell v. United States,* No. 11-1086, 2012 WL 2126551 (D. Md. June 11, 2012); *Cal v. Warren,* No. 07-11389, 2009 WL 388284 (E.D. Mich. Feb. 13, 2009); *Abdur'Rahman v. Colson,* 649 F.3d 468 (6th Cir. 2011).

192. Gershman, *supra* note 166.

193. *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014).

194. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107 (2006); Rob Warden, Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2004), *available at* http://www.law.northwestern.edu/wrongfulconvictions. *See also* Vesna Jaksic, *California May Crack Down on the Use of Jailhouse Informants: Commission Advises Law Requiring Corroboration*, 29 Nat'l L.J. 6 (Jan. 1, 2007) (Of the 117 death penalty appeals pending in the California State Public Defender's Office,17 involved testimony by in-custody informants and six by informants in constructive custody.).

195. Post-conviction analysis of DNA exoneration cases reveals that "[i]n more than 15 percent of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial." The Innocence Project, *Understand the Causes: Informants*, http://www.innocenceproject.org/understand/Snitches-Informants.php.

196. *Hunt v. Galaza*, No. CIV S-03-1723, 2009 WL 5183835 (E.D. Cal. Dec. 21, 2009).

197. *Id.* at *17.

198. *Id.*

199. *Payton v. Cullen*, 658 F.3d 890, 895 (9th Cir. 2011) (internal quotation marks omitted).

200. In a new statement dated July 13, 2006, the witness described the full extent of his relationship with and work for law enforcement when he testified at Payton's trial in 1981. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 895-96.

204. *Id.*

205. *Id.* at 896. For more examples of decisions in which witnesses admitted self-interested motives to testify, see *Green v. Harrison*, No. 05CV1485, 2009 WL 1953133 (S.D. Cal. July 6, 2009) (witness testified that no promises had been made but that she hoped for leniency in her upcoming sentencing); *United States v. Harris*, No. 07-10143, 2009 WL 4059388 (D. Kan. Nov. 20, 2009) (witness testified that he hoped for, and ultimately received, leniency in exchange for his testimony); *Armendariz v. Knowles*, No. C 07-00264, 2011 WL 3862082 (N.D. Cal. Aug. 31, 2011) (witness admitted he was motivated to cooperate by fear of returning to prison); *Smith v. Secretary Dept. of Corrs.*, No. 8:06-cv-1330-T-17MAP, 2009 WL 3416775 (M.D. Fla. Oct. 19, 2009), vacated and remanded by *Smith v. Secretary Dept. of Corrs.*, No. 10-11562, 2011 WL 4810173 (11th Cir. Oct. 12, 2011) (witness admitted he hoped for state favor in exchange for cooperation and that the state had helped in the past).

206. *Cooper v. McNeil*, No. 8:04-CV-1447-T-27MSS, 2008 WL 5252267 (M.D. Fla. Dec. 17, 2008).

207. *Id.* at *58.

208. *Id.*

209. *Id.*

210. For other decision examples of unexplained benefits given to government witnesses, see *Morgan v. Hardy*, 662 F.3d 790, 800-01 (7th Cir. 2011) (witness had two drug cases *nol prossed* before testifying); *Higgins v. Galaza,* No. CV 05-7599, 2011 WL 3420610 at *19 (C.D. Cal. Aug. 4, 2011) (prosecutor argued in closing that "his office turned down a plea deal with" the witness, and court found no information that a deal had been made, but following his testimony against petitioner the court sentencing the witness struck one charge and reduced the sentence for another); *Breedlove v. Berbary*, No. 09-CV-6297, 2011 WL 3439261 at *3-*4 (W.D.N.Y. Aug. 5, 2011) (affirming the state court's conclusion that the petitioner's unsupported allegations of favor are "'based upon nothing more than the release of the prosecution's witnesses from jail following [petitioner's] trial.'"); *Light-Roth v. Sinclair*, No. C11-0313-JCC, 2011 WL 7020919 (W.D. Wash. Nov. 2, 2011) (witnesses were given consideration at sentencing on open cases based on their cooperation as government witnesses); *Higgins v. Cain,* Civ. No. 09-2632, 2010 WL 890998 at *4 (E.D. La. March 8, 2010) (eyewitness Brown was arrested for battery on a police officer but never charged); *Ford v. Carey*, No. CIV S-05-0944, 2009 WL 3806224 (E.D. Cal. Nov. 12, 2009) (witness had felony charges dropped while awaiting defendant's trial). For other examples of unexplained benefits given to government witnesses, see *Mannino v. Graham*, No. 06 CV 6371, 2009 WL 2058791 (E.D.N.Y. July 15, 2009) (at sentencing on an open case, witness first asserted he was offered a promise for leniency in exchange for his testimony then recanted that statement).

211. *U.S. ex rel. Young v. McCann*, No. 07 C 1100, 2007 WL 2915634 (N.D. Ill. Oct. 5, 2007).

212. *Id.* at *2.

213. *Id.* at *7.

214. *Id.*

215. *Id.* at *8.

216. *Id.* For additional examples of decisions in which there is other information suggesting a motive to testify, see *Gentry v. Morgan*, No. C99-0289L, 2008 WL 4162998 (W.D. Wash. Sept. 4, 2008) (status of witness as a paid informant who had an ongoing relationship with the detectives and prosecutors involved in the case); *United States v. Faulkenberry*, 614 F.3d 573 (6th Cir. 2010) (defense witness had previously been an FBI informant); *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010) (status of witness as a recurrent snitch and the perks of snitching); *Williams v. Nish*, Civ. No. 07-1302, 2007 WL 2852443 (E.D. Pa. Sept. 26, 2007) (witness testified that he had no special relationship as an informant, but just before sentencing the prosecutor disclosed fact that witness did act as a police informant).

217. *Id.* at *8.

218. *Commw. of N. Mariana Islands v. Bowie*, 236 F.3d 1083, 1095-96 (9th Cir. 2001).

219. *Crawford v. United States*, 212 U.S. 183, 204 (1909); *see also On Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility.").

220. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 53-55 (2000).

221. R. Michael Cassidy, '*Soft Words of Hope:*' Giglio, *Accomplice Witnesses and the Problem of Implied Inducements*, 98 NWULR 1129, 1166 (2004).

222. Email from Michael Hersek, California State Public Defender, to Kathleen "Cookie" Ridolfi, Professor of Law, Santa Clara University School of Law (Oct. 22, 2013) (on file with recipient).

223. *Giglio v. United States*, 405 U.S. 150 (1972).

224. Cassidy, *supra* note 221 at 1131.

225. *Id.* (internal quotation marks omitted).

226. *Id.* at 1132.

227. *Id.* at 1144-47.

228. *Id.* at 1154.

229. *Id.* at 1145.

230. *Id.* at 1146.

231. *Id.* (citing Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 17-19 (2003); *United States v. Alegria*, 192 F.3d 179, 184-85 (1st Cir. 1999)).

232. "Even when an agreement under Model Three is formalized in writing, such as in most federal cooperation agreements, the government may make oral statements to the accomplice witness that augment, define, or give context to the open-ended terms used in the written instrument (*e.g.*, 'We'll just have to see how it goes, but if you really come through at trial I will recommend in my substantial assistance motion that the judge give you the street.'"). Cassidy, *supra* note 221, at 1148.

233. Cassidy, *supra* note 221, at 1148-49.

234. It is impossible to say with certainty which decisions fall under Model One and Model Three because the appellate record does not reflect negotiations between the government and the government's witnesses. However, there are a substantial number of decisions in the sample in which government witnesses received benefits after testifying for the prosecution. *See, e.g.*, *Light-Roth v. Sinclair*, No. C11-0313-JCC, 2011 WL 7020919 (W.D. Wash. Nov. 2, 2011) (government witness's cooperation in petitioner's case was presented to judge at witness's sentencing hearing); *Breedlove v. Berbary*, No. 09-CV-6297, 2011 WL 3439261 (W.D.N.Y. Aug. 5, 2011) (prosecution witness released from jail following petitioner's trial); *Higgins v. Galaza*, No. CV 05-7599, 2011 WL 3420610 (C.D. Cal. April 27, 2011) (government witness's sentence reduced based on cooperation in petitioner's case); *Jones v. Cain*, No. 10-213, 2010 WL 5375951 (E.D. La. Dec. 17, 2010) (government witness offered favorable treatment for his testimony); *Morgano v. Ricci*, No. 08-1524, 2010 WL 606503 (D.N.J. Feb. 18, 2010) (plea agreement with government witness made after petitioner's trial was complete); *Williams-El v. Bouchard*, No. 05-CV-70616-DT, 2009 WL 3004008 (E.D. Mich. Sept. 15, 2009) (government witness given subsequent lenient treatment following testimony in petitioner's case); *United States v. Harris*, No. 07-10143-JTM, 2009 WL 4059388 (D. Kan. Nov. 20, 2009) ("The mere fact that this witness's hopes later came true does not establish, in the absence of any further evidence ... that any deal actually existed at the time of the witnesses testimony."); *James v. United States*, 603 F. Supp. 2d 472 (E.D.N.Y. 2009) ("the government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony."); *Cooper v. McNeil*, No. 8:04-CV-1447-T-27MSS, 2008 WL 5252267 (M.D. Fla. Dec. 17, 2008) (witness was allowed conjugal visits, given reduced sentence for three grand theft charges and allowed to leave the prison to go out to dinner with family); *Flores v. Secretary Dept. of Corrections*, No. 8:06-CV-1756-T-30-TGW, 2008 WL 2977350 (M.D. Fla. Oct. 10, 2008) (government witness promised the possibility of a transfer to a prison facility closer to his family); *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (government witness expected some benefit in return for his testimony).

235. There was a strong statistical correlation between *Brady* violations and incentive/deal information. Eight percent of all incentive/deal decisions were *Brady* violations.

236. Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?* 74 FORDHAM L. REV. 257, 260 (2005).

237. *Id.* (citing The Innocence Project at Cardozo Sch. of Law, *Causes and Remedies of Wrongful Convictions*, http://www.innocenceproject.org/understand/factors_74_chart.php (listing the testimony of informants and snitches as a major factor in 14 of the first 74 wrongful convictions to be overturned by the results of post-conviction DNA testing)).

238. *United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979).

239. Cassidy, *supra* note 221, at 1166.

240. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

241. *Id.*

242. ABA Model Rule of Professional Conduct 3.8(d) (1984).

243. Black's Law Dictionary defined "impeachment evidence" as "[e]vidence to undermine a witness's credibility." (9th ed. 2009). *See also United States v. Bagley*, 473 U.S. 667, 676 (1985) (explaining that impeachment evidence is evidence "the defense might have used to impeach the Government's witnesses by showing bias or interest.").

244. *See supra* note 3 (*Brady* requires disclosure of impeachment information as well as exculpatory information).

245. Some courts hold, and the Department of Justice maintains, that admissibility of information is a precondition of a prosecutor's disclosure obligations. *See supra* note 66 (discussing the consideration of admissibility by courts resolving *Brady* claims and DOJ policy). Such reasoning fails to appreciate the critical role inadmissible information can often play in leading to admissible information. Failure to disclose this information may foreclose access to the admissible information necessary to proving that an accused is innocent. Separately, there are instances in which inadmissible information is nevertheless required to be admitted under the compulsory process clause of the Sixth Amendment, for example. *See* Peter Westen, *Compulsory Process*, 73 MICH. L. REV. 71, 120-21 (1974); *see also Holmes v. South Carolina*, 547

U.S. 319 (2006); *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Even if admissibility were a legitimate precondition to disclosure, allowing prosecutors to make a unilateral determination on the admissibility of a particular piece of information is incongruous with the adversarial process. Admissibility is typically a question for the courts, decided only after each side is given an opportunity to make an argument.

246. *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009); *United States v. Hernandez*, 312 F. App'x 937 (9th Cir. 2009); *Moseley v. Branker*, 545 F.3d 265 (4th Cir. 2008); *United States v. Butler*, 275 F. App'x 816 (11th Cir. 2008); *Shell v. Lewis*, No. C 11-2515 JSW, 2012 WL 3235798 (N.D. Cal. Aug. 6, 2012); *McClure v. United States*, Civ No. DKC 08-1830, 2011 WL 3511816 (D. Md. Aug. 10, 2011); *Fisher v. De Rosa*, No. ED CV 08-01470-RSWL, 2010 WL 6334518 (C.D. Cal. Nov. 23, 2010); *Ly v. Kansas*, No. 07-3259-CM, 2009 WL 4508165 (D. Kan. Dec. 2, 2009); *DeGonia v. Bowersox*, No. 4:06CV1601 CDP, 2009 WL 3068092 (E.D. Mo. Sept. 23, 2009); *United States v. Mungro*, No. 5:04CR18-1-V, 2008 WL 2048388 (W.D.N.C. May 13, 2008); *Morgan v. Calderone*, No. 1:07-cv-763-DFH-JMS, 2008 WL 2095526 (S.D. Ind. May 16, 2008).

247. *See infra* Section VII.A.

248. *Moya v. Sullivan*, No. CV 07-01598, 2010 WL 1023940 (C.D. Cal. Jan. 22, 2010).

249. *Id.* at *18.

250. *Id.* at *19. *See also Hunt v. Galaza*, No. CIV S-03-1723, 2009 WL 5183835 at *17 (E.D. Cal. Dec. 21, 2009) ("[t]here is no dispute regarding whether the evidence of [the witness's] proposed plea deal was favorable to petitioner or was suppressed by the government.").

251. *Salgado v. Allison*, No. EDCV 10-1822-MMM, 2011 WL 4529606 (C.D. Cal. Aug. 25, 2011).

252. *Id.* at *6.

253. *Gentry v. Morgan*, No. C99-0289L, 2008 WL 4162998 (W.D. Wash. Sept. 4, 2008).

254. *Id.* at *2.

255. *Id.* at *7.

256. *Id.*

257. *Id.* at *8.

258. *Id.*

259. *Id.* For more examples in which courts acknowledge the exculpatory or impeachment value of information without expressly calling it favorable, *see Quintana v. Armstrong*, 337 F. App'x 23 (2d Cir. 2009) ("undisclosed impeachment evidence"); *Shue v. Sisto*, 444 F. App'x 172 (9th Cir. 2011) (witness's prior conviction for welfare fraud was impeachment information); *United States v. Butler*, 275 F. App'x 816 (11th Cir. 2008) (impeachment information not material); *Bell v. Bell,* No. 04-5523, 2008 WL 50315 (6th Cir. Jan. 4, 2008) (non-disclosure of deal information that tended to reinforce the defense's theory of the case); *Flores v. Woodford*, No. CV 08-2729-DOC, 2011 WL 3564426 (C.D. Cal. Jan. 14, 2011) ("impeachment information relevant to an investigating officer"); *Menei v. Ballard*, No. 2:09-cv-01516, 2011 WL 612808 (S.D. W.Va. Jan. 11, 2011) ("statements constitute impeachment evidence"); *United States v. Ramos-Gonzalez*, 747 F. Supp. 2d 280 (D. P.R. 2010) (key government witness's letter was "collateral impeachment evidence"); *United States v. Jones*, 609 F. Supp. 2d 113 (D. Mass. 2009) (witness statement was "plainly material exculpatory evidence"); *United States v. Ledingham*, No. 6:07-CR-00007, 2008 WL 4621838 (W.D. Va. Oct. 17, 2008) (The ATF claim form is exculpatory material).

260. *Id.* at *12.

261. *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011), vacated and remanded by *Trevino v. Thaler*, 133 S. Ct. 1911 (May 28, 2013).

262. *Id.* at 435.

263. *Stevenson v. Yates*, 407 F. App'x 178 (9th Cir. 2010).

264. *Id.* at 181.

265. *Id.* at 180.

266. *Id.* at 180-81.

267. *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010).

268. *Id.* at 892.

269. *Id.*

270. *Id.* (emphasis in original).

271. *Id.*

272. *Id.*

273. *Id.* at 894.

274. Here, correlation exists between death penalty decisions and favorable information. Favorable information is overrepresented in death penalty decisions. (Chi Square statistic .002).

275. For example, in *Wessinger v. Cain*, an investigative report showing petitioner's fingerprints were not on the gun or at the scene of

the crime was just one of 13 separate pieces of information withheld from the defense. *Wessinger v. Cain*, Civ. No. 04-637, 2012 WL 602160 (M.D. La. Feb. 23, 2012). In that decision, the court expressed clear "concern that so much evidence apparently did not make it to the hands of the defense team for trial." *Id.* at *15. The court said, "[i]t should have." *Id.* The court also clearly explained that disclosure of the report "would no doubt have helped the defense's case." *Id.* Despite the court's criticism of the prosecution, the court did not find any single piece of withheld information, or the cumulative effect of 13 pieces of withheld information, to be material.

276. A prosecutor could conceivably parse through the discovery in a case and disclose only the information that in his judgment is material exculpatory information, withholding all other favorable information to the detriment of the defendant's case. The problem is exacerbated by contextual bias and the limitations of judging what is material in a case before the case unfolds.

277. *See supra* note 4 at 1959 (the two-day symposium examined "best practices to optimize effective training, supervision, and control mechanisms for managing information within prosecutors' offices"). *See also* Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosures*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN PRACTICE 269 (Leslie C. Levin & Lynn Mather eds., 2012).

278. Brief of the American Bar Association as *Amicus Curiae* Supporting Petitioner at 1, *Smith v. Cain*, 565 U.S. ___, 132 S. Ct. 627 (2012) (No. 10-8145); *See also Cone v. Bell,* 556 U.S. 449, 477 n.15 (2009).

279. *See* ABA Formal Opinion 09-454 at 1.

280. Nancy Gertner & Barry Scheck, *Combatting* Brady *Violations With an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40 (outlining the elements of an effective ethical rule order and the best practices for obtaining judicial action and compliance).

281. *Supra* note 76.

282. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009). *See supra* note 76.

283. Had the defense in *Brooks v. Tennessee* requested an order to comply with Rule 3.8(d), the prosecutor in the case would have been accountable for the professional failing noted by the court. *See supra* note 267 and p.41-42.

284. ABA Formal Opinion 09-454 at 1 (2009). A state's adoption of ABA Model Rule 3.8(d) does not mean that the state has also adopted ABA Formal Opinion 09-454. For example, the Ohio Supreme Court expressly rejected the ABA's position in *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125 (Ohio 2010). The ABA Opinion has also received pointed criticism. *See, e.g.,* Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1767 (August 2012) (citing Margaret Colgate Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 GEO. J. LEGAL ETHICS 441, 469 (2002)).

285. 28 U.S.C. § 530B(a) states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." *See* Schwartz, *supra* note 51, at 34.

286. *See* Schwartz, *supra* note 51, at 34.

287. *Id.*

288. Gertner & Scheck, *supra* note 280, at 44.

289. *Id.*

290. Brief of the National Association of Assistant United States Attorneys and National District Attorneys Association as *Amici Curiae* Supporting Petitioners at 13-15, *Pottawattamie County v. McGhee,* 547 F.3d. 922, 925 (8th Cir. 2008), *cert. granted*, 556 U.S. 1181 (2009) (mem.), *cert. dismissed*, 558 U.S. 1103 (2010) (mem.).

291. *Id.*

292. *See supra* notes 80 and 82 (as set forth in the Ogden Memo and the U.S. Attorney's Manual, it is not the policy of the U.S. Department of Justice to disclose all favorable information).

293. *Id.*

294. American College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 95 (2004).

295. *Id.* at 101.

296. Yaroshefsky, *supra* note 277.

297. *See* The BLT: The Blog of LegalTimes, *DOJ Pushes 'Comprehensive Approach' to Discovery Reform*, Nov. 6, 2009 ("Judge Paul Friedman of the U.S. District Court for the District of Columbia says he's 'radicalized' when it comes to prosecution disclosure obligations. He is a proponent of a federal rule that clearly spells out the government's obligation to turn over favorable evidence to defense lawyers."); The BLT: The Blog of LegalTimes, *Judicial Conference to Review Prosecution Disclosure Obligations*, July 8, 2009 ("Judge Emmet Sullivan of the U.S. District Court for the District of Columbia wrote the committee in April urging it to re-examine amending Rule 16 to require

disclosure of any exculpatory information."); *but see* The Third Branch News, *Judiciary Split on Need for Rule 16 Changes*, May 2011, *available at*: http://www.uscourts.gov/news/TheThirdBranch/11-05-01/Judiciary_Split_on_Need_for_Rule_16_Changes.aspx.

298. *See supra* Section I (discussing the prosecution of Senator Ted Stevens).

299. The Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (adding a new section, "3014. Duty to disclose favorable information." to Title 18 of the United States Code). The Fairness in Disclosure of Evidence Act of 2012 is bipartisan in nature with former Sen. Daniel Inouye (D-HI) joining Sen. Lisa Murkowski as a lead sponsor and Sen. Mark Begich (D-AK) and former Sens. Kay Bailey Hutchinson (R-TX) and Daniel Akaka (D-HI) as original co-sponsors. *Id.*

300. *Id.* at proposed § 3014(a)(1). *See* Peter Goldberger, *Codifying the* Brady *Rule*, The Champion, May 2013, at 8-11 (providing a detailed section-by-section examination of the Act).

301. Congress failed to enact S. 2197 prior to the close of the 112th legislative session.

302. The legislation is supported by NACDL, the ABA, the American Civil Liberties Union, the Constitution Project and the Institute for Legal Reform at the U.S. Chamber of Commerce. *See* News Release, NACDL, NACDL Applauds Sensible, Bipartisan Discovery Reform Legislation Introduced Today in the United States Senate (March 15, 2012), *available at* http://www.nacdl.org/NewsReleases.aspx?id=23792&libID=23761 ("passage would represent a giant step forward in improving the fairness and accuracy of our criminal justice system").

303. S. 2197 at proposed § 3014(a).

304. *Id.* at proposed § 3014(b).

305. *Id.* at proposed § 3014(a)(2) (the prosecution team includes the "(A) the Executive agency ... that brings the criminal prosecution on behalf of the United States" and "(B) any entity or individual, including a law enforcement agency or official, that—(i) acts on behalf of the United States with respect to the criminal prosecution; (ii) acts under the control of the United States with respect to the criminal prosecution; or (iii) participates, jointly with the Executive agency ... in any investigation with respect to the criminal prosecution.").

306. *See id.* at proposed § 3014(e) (the court may issue a protective order when the information is favorable solely because it provides a basis for impeaching the testimony of a potential witness and only if the government "establishes a reasonable basis to believe" the identity of the potential witness is not known to the defendant and disclosure "would present a threat to the safety of the potential witness or of any other person.").

307. *See id.* at proposed § 3014(d)(2) (classified information remains under the purview of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16).

308. *Id.* at proposed § 3014(c).

309. The continuing duty to disclose also applies "without regard to whether the defendant has entered or agreed to enter a guilty plea." *Id.*

310. *See* Dervan & Edkins, *supra* note 92 (empirical study examining the use of plea bargaining and its innocence problem).

311. ABA Model Rule 3.8(d) has been adopted by all states except California, where the California State Bar has prepared a proposal for adoption that will be submitted to the California Supreme Court for consideration. *See supra* note 76; State Bar of California, Proposed Rules of Professional Conduct, Rule 3.8(d), *available at* http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx; *see also* Petition to Approve New California Rules of Professional Conduct and Repeal Existing Rules of Professional Conduct, State Bar of California (Cal. July 20, 2011), *available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=sOY6VmyQx7s%3d&tabid=2669; *Ethics Rules Get a Rewrite*, Cal. B.J., April 2010, *available at* http://www.calbarjournal.com/April2010/TopHeadlines/TH3.aspx.

312. As Judge Alex Kozinski points out in his recent dissent in *United States v. Olsen*, a restrictive materiality standard poses serious risks that prosecutors inclined to practice close to the ethical line will cross it. *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013).

313. The ultimate ruling in these 210 decisions was based on the materiality of the most significant piece of allegedly withheld information, even though many of these decisions involve multiple pieces of information.

314. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

315. *Olsen*, 737 F.3d at 626.

316. Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecutor's Files*, The Champion, May 2013, at 26, 28.

317. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

APPENDIX A — METHODOLOGY

In developing this study, NACDL and VERITAS Initiative researchers sought to obtain quantitative answers to three questions:

1. Are courts consistent in the use and application of the materiality standard when deciding *Brady* claims?

2. What other issues or factors, if any, influence or underlie courts' resolutions of *Brady* claims?

3. To what extent is favorable information being withheld from the defense?

The researchers established a variety of parameters to narrow the research into a manageable data set without compromising the possibility of statistically meaningful relationships.

Specifically, in order to ensure the study included a sufficient number of judicial decisions and that the decisions were randomly selected, the researchers limited the universe of decisions to those made in federal courts over a defined five-year time period from August 2007 to August 2012.[318] From that group, using Westlaw, the Research Team identified over 5,000 decisions in which *"Brady v. Maryland"* appeared in the text of the decision, and pulled a stratified random sample[319] of those decisions to arrive at the Study Sample of 1,497 decisions for a closer reading, analysis, and coding.

In order to ensure ultimate consistency, the Research Team developed an extensive Guidance Document providing step-by-step instructions for the analysis and coding of each of the 1,497 decisions in the Study Sample. The Guidance Document aligns with a coding spreadsheet used by the Research Team to code every entry in the Study Sample and describes each piece of information to be coded in the spreadsheet. It includes detailed instructions for determining the proper code for each piece of information in each decision. The Guidance Document begins on page four.

As an initial matter, for each decision, researchers determined whether the court addressed a *Brady* claim on its merits. Specifically, if a court identified and/or acknowledged a *Brady* claim, applied any portion of the *Brady* analysis to the claim, and reached a conclusion as to the merit of the claim, then the decision was coded as "merits" and it was subjected to extensive analysis. If a court discarded the *Brady* claim on procedural grounds, then the decision was coded as a "non-merits" decision and no further analysis or coding was conducted for it.[320] In addition, researchers coded each "merits" decision in a vacuum, without regard to any later treatment of the decision by a reviewing court.

As outlined in the Guidance Document, the researchers coded every "merits" decision by using the following objective characteristics: decision year; trial year; procedural posture; origin jurisdiction; current jurisdiction; type of representation; type of crime; imposition of death sentence; and decision result.

With regard to "type of representation," researchers made best efforts to distinguish between public defenders, court-appointed counsel, and private counsel. Regardless, in every decision the researchers determined whether the petitioner/appellant appeared *pro se* or had some form of representation.

For "crime type," the Research Team selected from the following options: violent (non-sex); sex (violent and non-violent); property; weapon; drug; immigration; white collar and regulatory; and other. The Guidance Document established definitions for each crime type.[321] In addition, researchers labeled decisions as "death sentence" if the petitioner/appellant was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, that the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner/appellant to be executed. Decisions in which a petitioner/appellant had been facing the death penalty at one point, but the possibility of receiving the death penalty was removed, were not coded as "death sentence" decisions.

In addition to these objective categories, researchers coded every decision for a variety of more subjective categories that required the researcher to apply certain principles to the court's opinion and ultimately make a determination as articulated in the Guidance Document. Every "merits" decision received only one code in the following categories:

- Value of Information: exculpatory; impeachment; both.
- *Brady* Claim Result: (1) disclosure/no withholding; (2) not favorable; (3) not material; (4) *Brady* violation.

Every "merits" decision received one or more codes in the following categories:

- Type of Information: physical; statements/testimony; documentary; incentive/deal; other.
- Favorability: favorable; not favorable; late disclosure; insufficient detail; does not exist; not relevant or frivolous.
- Disclosure/No Withholding: multiple codes available to describe court's rationale for concluding the allegedly withheld information was not withheld or was disclosed.
- Materiality Test: multiple codes available to describe the materiality test articulated by the court when assessing materiality of allegedly withheld information.
- Materiality Factors: various factors the court may have considered when assessing materiality of allegedly withheld information.

As described in the Guidance Document, every decision received additional coding in the favorability category to reflect the manner in which favorability was determined.

A variety of quality assurance measures were put in place to optimize coding consistency. The measures included, but were not limited to:

Material Indifference:

- Coding of the first 150 decisions in the Study Sample by two separate researchers and conducting a comparison of the coding results.

- Coding of the first 10 decisions of each researcher by a **project supervisor** and conducting a comparison of the coding results.

- Adjustments and calibrations to the Guidance Document based on the coding comparisons.

- Weekly questions and answers among all researchers and project supervisors.

- The ability of researchers to flag decisions for supervisory review.

- Supervisory review of over 65 percent of the decisions.

- External review of 250 decisions by criminal defense practitioners.

In addition to the above quality assurance measures, Project Supervisors conducted a significant review of the decisions and the coding for a variety of purposes, including code correction, trend analysis, supplemental coding, code correction, and other edits.

Researchers analyzed the data for statistical significance to find issues that were not likely to occur randomly, but rather were attributable to a specific cause. Statistical significance was determined by conducting a **chi-square calculation**, used to evaluate the level of statistical significance attained in a cross-tabulation. The chi-square calculation shows how likely it is that an observed distribution is due to chance. For a relationship to be considered statistically significant, it must meet a minimum level of significance, which was set at .05 in this study. In other words, if a chi-square calculation is less than the .05 level, there would be less than a five percent probability that the correlation occurred by chance.

It is important to acknowledge the limitations of the study's methodology. As discussed earlier, this study only looks at decisions that stem from a challenge to a criminal conviction, which are almost exclusively the result of a trial, raised through a writ of *habeas corpus*, an appeal, and in limited instances a post-trial motion. The study therefore does not touch on the majority of criminal prosecutions resolved without trial, which make up more than 90 percent of all criminal cases,[322] or those cases in which the information is yet to be discovered. In addition, the Study Sample includes less than one-third of the federal court decisions citing *Brady* during the selected five-year time period, and it does include *Brady* claims that were abandoned before reaching federal court.

BRADY MATERIALITY STUDY GUIDANCE DOCUMENT

This document seeks to provide step-by-step guidance for the analysis and coding of every decision reviewed as part of the *Brady* Materiality Study being conducted by VERITAS and NACDL. The goal of this document is to create and maintain maximum consistency throughout the entire coding process. This document aligns with the coding spreadsheet and describes each piece of information that must be listed on the coding spreadsheet. Please review this document in its entirety prior to coding. Note: The phrase "the opinion" is used throughout this document to refer to the written opinion that you are reading, analyzing and coding.

Decision Name — List the decision name provided by Westlaw. Only include the last name(s) of the party. Abbreviate "versus" as "v." and "United States" as "U.S."

Citation — List the Westlaw citation only. If there is no Westlaw citation, then list the federal reporter citation.

Higher Court Review of the Opinion (A/R/F) — This category looks at whether the opinion was reviewed by a higher court and, if so, *whether the opinion was affirmed or reversed.* Use Westlaw's "Full History" and "Direct History" functions to determine the correct entry for this column. If the opinion was reviewed by more than one higher court, such as a Circuit Court and the U.S. Supreme Court, then enter the ruling on the opinion of the highest court only. Mark "A" for an affirmed ruling, "R" for a reversed ruling, and "F" if there was no higher court review of the case.

Brady* Merits Claim (Y/N) —** This category asks, as an initial matter, whether this opinion addresses a *Brady* claim on its merits. If, for example, there is no *Brady* claim at all or the opinion states that the defendant "has not exhausted state remedies" and thus the *Brady* claim is not ripe for consideration, then the opinion ***does not address a *Brady* claim on its merits.

If, for example, the opinion decides the case on another issue and does not reach the *Brady* claim, then the opinion ***does not*** address a *Brady* claim on its merits. If there is absolutely no discussion of the *Brady* claim other than a flat denial, then the opinion does not address a *Brady* claim on its merits. However, if, for example, the opinion dismisses the defendant's *Brady* claim on the grounds that there was no suppression, then the opinion ***does*** address a *Brady* claim on its merits.

If the court ***does not*** address a *Brady* claim on its merits, then type "N" and move on to the next case. If the court ***does*** address a *Brady* claim on its merits, then type "Y" and continue the analysis and coding.

Material Indifference:

Year of Decision — List the year the opinion was decided by the court.

Trial Year — If available, list the year that the trial, or proceeding out of which the *Brady* claim arose, concluded. To the extent there were multiple trials or proceedings, use the trial or proceeding referenced in the opinion. If the opinion is based on a motion, and not a trial, then list the same year as the opinion.

Procedural Posture — List the method in which the underlying case or decision reached the court writing the opinion. Use the following phrases:

- A = Appeal
- HP = *Habeas* petition to be reviewed on the merits, including opinions adopting all or part of a Magistrate Judge's Report and Recommendation
- HRR = *Habeas* petition report and recommendation, i.e., opinions of Magistrate Judges

[*Note: This classification will require additional follow-up to determine whether the recommendation was adopted. Please look at the history to find whether the recommendation was adopted and include in the Notes section. See Notes for further instructions.*]

- HD = Appeal of *Habeas* petition denial
- HG = Appeal of *Habeas* petition grant
- MPJ = Motions post-judgment (to vacate, for new trial, for judgment of acquittal)
- MTN = Motions during trial (for mistrial, to dismiss, to suppress evidence)
  - MD = Motion to Dismiss
  - MM = Motion for Mistrial
  - MS = Motion to Suppress Evidence
- OTHER = Procedural postures listed below:
  - CN = Petition for Writ of *Coram Nobis*
  - COA = Request for Certificate of Appealability
  - ASHP = Application for Stay of HP

Origin 1 — This category looks at the very first point of entry, into the criminal justice system, of the case upon which the opinion is based. List "State" for decisions originating in state court or "Fed" for decisions originating in federal court.

Origin 2 — This category looks at the very first point of entry, into the criminal justice system, of the case upon which the opinion is based. For decisions originating in state court, list the two-letter abbreviation of that state. For decisions originating in federal district court, list the commonly accepted abbreviation for that court, such as "E.D.N.Y.," "D.D.C.," "S.D. Cal.," etc.

Current Juris 1 — This category looks at the court that issued the opinion. List "District" for federal district courts, "Circuit" for federal circuit courts, and "SCOTUS" for the U.S. Supreme Court.

Current Juris 2 — This category looks at the court that issued the opinion. For federal district courts, list the commonly accepted abbreviation for that court, such as "E.D.N.Y." "D.D.C." "S.D. Cal." etc. For federal circuit courts, simply list the circuit court's number only (*i.e.*, "2" not "2nd"). For the U.S. Supreme Court, simply list "U.S."

Defense Attorney Name — If available, list the complete name of the defense attorney(s) as it appears in the opinion. If there is no name, leave this entry blank. If the defendant is *pro se*, then type the defendant's full name. This category looks at the proceedings related to the opinion, not the lower court proceedings.

Type of Representation — Mark the appropriate number in the box according to the type of defense representation as it appears in the opinion. This category looks at the proceedings related to the opinion, not the lower court proceedings. Select from:

- Select (1) if Represented by Counsel.
- Select (2) if *Pro Se*.
- Select (3) if Unknown.

Crime — Most serious charge — List the most serious or leading criminal charge against the defendant. Use your best judgment on which crime is the most serious. If you have a question, please consult a supervisor.

Type of Crime(s) — Mark the appropriate number in the box according to the most serious type of crime charged against the defendant. Select from the following:

- Select (1) if Violent (non-sex) = Violent crimes, not sexual in nature, such as murder or assault.
- Select (2) if Sex (violent or not) = Sex crimes, violent or non-violent, such as rape or child porn possession.
- Select (3) if Property = Crimes against property, such as arson or burglary.
- Select (4) if Drug = Crimes involving controlled substances.
- Select (5) if White Collar and Reg = Financial crimes, corruption, paperwork or regulatory violations, etc.
- Select (6) if Other = Anything that does not easily fit into the above categories.

Death Sentence Imposed — This category asks whether a death sentence was imposed in the underlying case. Mark "Y" or "N."[323]

Nature of the Information — Describe with specificity the information the defendant asserts the government withheld in violation of *Brady*. If there is more than one piece of information, label each with a), b), c) ... etc.

Type of Information — Mark the appropriate number in the box(s) according to the type(s) of information the defendant asserts the government withheld in violation of *Brady*. **Mark as many types that apply to the information**. Select from the following:

- Select (1) if Physical — This category includes physical items (any material object such as a murder weapon), trace material (such as fingerprints or firearm residue), and biological material (such as DNA).
- Select (2) if Statements/Testimony — This category includes statements or declarations of fact, either oral or written, by any person. This includes transcripts, statements to or by police, misidentifications or failures to identify the accused, etc.
- Select (3) if Documentary — Documentary information includes any media by which

information can be preserved, such as police reports, medical records, photographs, tape recordings, films, printed emails, and writings on paper. This includes information on criminal history, prior bad acts and known but uncharged conduct or bad acts, as well as information on mental or physical impairments of the accused. This does not include statements covered by the "statements/testimony" category.

- Select (4) if Incentive/Deal — Information on an agreement between the government and a witness, in which the witness is promised, given or may be given, some incentive, benefit, leniency, etc., in exchange for his or her testimony, statement or assistance.

- Select (5) if Other — Information that is not physical, testimony, or documentary in nature.

Incentive Deal Code — This category seeks to code the different types of incentive/deal information. Please code this section **only if this is an incentive/deal decision** designated by a (4) in the Nature of Information code. Select from:

- Select (1) if the incentive/deal information involves a government deal with a witness.

- Select (2) if the incentive/deal information involves a witness with an admitted self-interested reason to testify.

- Select (3) if the incentive/deal information involves a government witness receiving unexplained benefits.

- Select (4) if the incentive/deal information involves information suggesting the witness had a self-interested motive to testify.

- Select (5) if the incentive/deal information cannot be substantiated according to the facts and/or evidence.

Information Code — This category asks whether the information the defendant asserts the government withheld in violation of *Brady* is exculpatory information, impeachment information, or both. This category looks at the information from the **perspective of the defendant** and his or her asserted characterization of the information as exculpatory, impeachment of both. Select (1) for exculpatory, (2) for impeachment, and (3) for both. Consider these definitions as guidance:

- Exculpatory: Information that is favorable to the defendant, points to the defendant's innocence or mitigating defendant's guilt.

- Impeachment: Information that calls into question the credibility of a witness against the defendant, including a police officer or other agent of the government.

Result of *Brady* Claim — Provide a short description of the court's conclusions on the *Brady* claim, as articulated in the opinion. If there is no explanation of the court's ruling, then note that here. If there are different results for different pieces of information, please denote that with the corresponding a), b), c) from above.

***Brady* Result Code —** This category asks for the court's ruling on the defendant's asserted *Brady* violation as articulated in the opinion. The court may rule based on prong (1) or (2) but then engage in a discussion of materiality. If that happens, then code based on the actual ruling and not any additional discussion. Select **only one** from the following:

- Select (1) if the opinion concludes there was no withholding.
- Select (2) if the opinion concludes information was withheld, but it was not favorable.
- Select (3) if the opinion concludes favorable information was withheld, but it was not material.
- Select (4) if the opinion concludes there was a *Brady* violation.

Favorable Withheld Code — This category asks whether the information the defendant asserts the government withheld **was actually** withheld and favorable. "Withholding" in this category includes decisions in which favorable information was disclosed late. Only those decisions with ***Brady* Result Code** (1), (3), or (4) should be coded in this section. Please select one of the following:

- FW = Favorable information withheld, favorable information disclosed late
- O = Other, information not favorable, information not relevant, information not withheld

Favorability Code — This category asks whether the favorability of the withheld information is expressly stated by the court, acknowledged by the court or implicit in the facts of the case. The decisions in this category are assessed from the **perspective of the court as well as considering the stated facts of the case.** Please select one of the following:

- FE = Favorable Express (The court expressly calls the information "favorable")
- FA = Favorable Acknowledged (The court does not expressly call the information "favorable," but does state that the information has either "exculpatory" or "impeachment" value to the defense)
- FI = Favorable Implicit (The court is silent on the favorability of the information, but favorability is implied upon a reading of the facts of the decision by the Research Team)

Favorable Late Disclosure Code — This category seeks to code decisions in which favorable information was disclosed late. Please code this section **only if this is a favorable withheld decision** designated by a FW in the Favorable Withheld Code. Select from the following:

- FL = Favorable Late (Favorable information was disclosed late)
- O = Other (Information was not favorable, information was timely disclosed, favorable information was withheld)

Favorable Late Disclosure Timing — This category seeks to code the timing of the late disclosure of favorable information. Please code this section **only if this is a favorable late disclosure decision** designated by a FL in the Favorable Late Disclosure Code. Select from the following:

- P = Pre-trial
- D = During trial
- A = After government received
- E = End of trial

Due Diligence Code — This category seeks to code those decisions in which the court finds

information is not withheld because the defendant knew about the information or could have obtained the information through exercise of due diligence. Please code this section **only if this is a no withholding decision** designated by a (1) in the *Brady* Result Code. Select from the following:

- DD = The court finds **relevant** or **favorable** information not to be withheld because the defendant knew about the information or could have obtained the information through exercise of reasonable diligence

- O = Other, the information was disclosed to the defendant or the information is not relevant or favorable to defendant's claim

Due Diligence Basis — This category seeks to code the basis for the court's imposition of the due diligence rule upon the defendant. Please code this section **only if this is a due diligence decision** designated by a DD in the Due Diligence Code. Select from the following:

- C = Defendant created the information

- DD = Defendant could have obtained the information through due diligence

- K = Defendant knew about the information

No Withholding Details — Provide a description of the court's reasoning behind its finding of no withholding. Please code this section **only if this is a no withholding decision** designated by a (1) in the *Brady* Result Code.

***Brady* Materiality Analysis Details —** Provide a description of the court's *Brady* materiality analysis as articulated in the opinion. Include any factors the court disregarded, considered but dismissed, and/or found persuasive. If the court rules that there was no withholding or the information was not favorable, but continues to do a materiality analysis, fill out the materiality analysis columns.

Materiality Tests — This category seeks the court's ultimate reasoning and conclusion on the materiality of the withheld information. This selection should not be based on the court's general recitation of case law, precedent and standards of review. Rather, the reviewer should select which of the following tests most closely parallels or accurately reflects the test/reason articulated by the court when declaring that the information at issue is or is not material. Possible variations on each test have been provided below. **Please select more than one code if necessary**:

- **RD = Reasonable Doubt:** Whether the withheld information creates a reasonable doubt that did not otherwise exist. Whether, in light of the whole record, the withheld information creates a reasonable doubt that did not otherwise exist.

- **SCRD = Significant Chance of Reasonable Doubt:** Whether there is a significant chance that the withheld information would have induced a reasonable doubt in the minds of enough jurors to avoid conviction.

- **RL = Reasonable Likelihood:** Whether there is a reasonable likelihood that the withheld information could have affected the judgment of the trier of fact. Whether there is any reasonable likelihood that the withheld information might have affected the jury's ultimate judgment.

- **RProb = Reasonable Probability:** Whether there is a reasonable probability that, had the information been disclosed, the result would have been different. Whether the withheld

information would have made a difference great enough to show a reasonable probability that the result would have been different. Whether there is reasonable probability that disclosure would have made any difference at the guilt or penalty stage of the trial

- **FT = Verdict Confidence/Fair Trial:** Whether the withheld information could reasonably put the whole case in such a different light as to undermine confidence in the verdict. Whether, in the absence of the withheld information, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Whether we can be confident that the jury would have returned the same verdict had the information been disclosed.

- **RPoss = Reasonable Possibility:** Whether there is a reasonable possibility that, had the information been disclosed, the result would have been different.

- **PE = Preponderance of Information:** Whether the defendant has shown, by a preponderance of the evidence, that disclosure of the withheld information would have resulted in acquittal.

- **CC = Clear and Convincing:** Whether the defendant has shown, by clear and convincing evidence, that disclosure of the withheld information would have resulted in acquittal.

- **DV = Different View of Testimony:** Whether there is a reasonable probability that, had the information been disclosed, one or more members of the jury could have viewed the witness's testimony differently.

- **PT = Probative Tendency:** Whether the withheld information has some probative tendency to preclude a finding of guilt or lessen punishment.

- **OT = Other:** Any test that does not fit into one of the above categories. Provide the test language in "*Brady* Materiality Analysis Details" category.

---

1. The Study Sample included only decisions made by federal courts. However, these decisions resolved *Brady* claims from both federal and state prosecutions. Decisions originating in state courts generally reached the federal courts through a petition for a writ of *habeas corpus*. *See* 28 U.S.C. § 2254.

2. Stratified sampling is generally used when a population is heterogeneous, where sub-populations, commonly called strata, can be isolated. A stratified sample is obtained by taking samples from each stratum or sub-group of a population. To get a stratified random sample of approximately 1,500 decisions, researchers first found the percentage of the total: 1,500 targeted decisions / 5,587 total decisions between August 2007 to August 2012 = 26.8 percent. To get a random sampling of these targeted 1,500 decisions, the 5,587 decisions were first grouped by year. Using Microsoft Excel's =Rand() formula, each decision in each year was assigned a random decimal between 0 and 1. Researchers then arranged the decisions in each respective year from smallest random decimal to largest random decimal and starting from the smallest decimal, selected the corresponding number of decisions from the stratified sample calculation, 26.8 percent of the decisions from each year.

3. There were some decisions in which the court resolved the *Brady* claim on the merits, but did so with either a flat denial or a discussion so limited that the researchers were unable to discern any meaningful information about the claim. Because these decisions did not include a merits discussion, and therefore could not be analyzed in the same manner as the "merits" decisions, they were not included in the "merits" group of decisions. Rather, these decisions were included in the "non-merits" group of decisions and did not receive any additional coding.

4. Ultimately, the decisions coded as "weapon" and "immigration" crimes were consolidated together and added to the decisions coded as "other" crimes for the purposes of data presentation and statistical analysis.

5. *See supra* note 92 (noting that 97 percent of federal convictions and 94 percent of state convictions are the result of a plea agreement).

6. After the initial coding, Project Supervisors reviewed all the decisions coded as "death sentence imposed" in order to exclude those decisions in which a petitioner had been facing the death penalty at one point, but the possibility of receiving the death penalty was later removed. Thus, the group of death penalty decisions discussed in this report only includes those in which the petitioner was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, that the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner to execution.

APPENDIX B — REPORT GLOSSARY

***Brady* Violation:** A court resolves a *Brady* claim by finding that the prosecution withheld or failed to disclose favorable, material information in violation of *Brady v. Maryland.*

***Bagley* Standard:** The standard for assessing materiality articulated in the U.S. Supreme Court decision of *U.S. v Bagley*, 473 U.S. 667, 702 (1985) (Specifically, information is only material if there is a "reasonable probability" that the result would have been different had the information been disclosed to the defense).

***Brady v. Maryland*:** U.S. Supreme Court decision holding that the non-disclosure of favorable information to the accused violates due process when the information is material either to guilt or punishment. 373 U.S. 83 (1963). This holding is sometimes referred to as the *Brady* rule.

Chi-Square Calculation: The chi-square calculation shows how likely it is that an observed distribution is due to chance.

Death Penalty Decision: Decision in which the petitioner/appellant was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner/appellant to execution.

Due Diligence Decision: Decision in which the court excuses the prosecution's non-disclosure or late disclosure of relevant or favorable information by imposing the due diligence 'rule' on the defense.

Due Diligence 'Rule': Rule that excuses the prosecution's failure to disclose information if the defendant could have, should have, or actually did know about the undisclosed information, or the essential facts permitting the defendant to take advantage of the information.

Ethical Rule Order: Court order that requires prosecutors to comply with ABA Rule 3.8(d) or state law adopting the rule, which requires disclosure of information that "tends to negate the guilt of the accused or mitigates the offense," and states that "willful and deliberate failure to comply" with the mandate of Rule 3.8(d) will be viewed as contempt of court.

Fairness in Disclosure of Evidence Act of 2012: U.S. Senate bill 2197, introduced by Senator Lisa Murkowski and others during the 112th Congress, requiring prosecutors to disclose all information that may reasonably appear favorable to the defendant and appellate courts to employ a harmless beyond a reasonable doubt standard of review for disclosure violation claims.

Favorable Information: Information that tends to negate the guilt of the defendant, to mitigate the defendant's sentence, or to have a negative impact on the credibility or reliability of a government witness. This information includes both admissible and inadmissible evidence.

Favorable Information Decision: Decision in which the court explicitly states the information is "favorable," the court implies the information is favorable by acknowledging the exculpatory or impeaching value of the information, or the favorable nature of the information could be discerned from a reasonable reading of the facts.

Federal Criminal Procedure Rule 16: Rule for U.S. District Courts that establishes disclosure rules, procedures, and obligations for both the prosecution and the defense in relation to a federal criminal prosecution.

Federal-Originated Decision/Case: Decision in which the underlying case originated in federal court.

Guidance Document: Document implementing the study methodology by providing step-by-step guidance for the analysis and coding of every decision reviewed as part of the study. The Guidance Document is part of the Methodology Appendix and aligns with a coding spreadsheet used by the Research Team to collect data on every entry in the Study Sample.

***Habeas Corpus*:** A *habeas corpus* petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error.

Incentive/Deal Information: Information of an agreement between the government and a witness, in which the witness is promised, given, or may be given, some incentive, benefit, leniency, etc., in exchange for his or her testimony, statement or assistance. This also includes information that a witness had an admitted self-interest to testify, information of a government witness receiving unexplained benefits, and information suggesting a witness had a self-interested motive to testify.

Jencks Act: A federal statute codified at 18 U.S.C. § 3500 that, among other things, permits prosecutors to withhold witness statements until after the witness has testified on direct examination.

***Kyles* Standard:** The standard for materiality articulated in the U.S. Supreme Court decision *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (Specifically, when deciding materiality, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

Late Disclosure Decision: Favorable information decision in which the disclosure of the favorable information was untimely.

Methodology Appendix: A detailed description of the methodology implemented by the Research Team in analyzing the Study Sample.

Merits Decision: Decision within the Study Sample that addresses and analyzes a *Brady* claim on the merits.

Non-Merits Decision: Decision within the Study Sample that does not address the defendant's *Brady* claim on the merits because the claim is not ripe for consideration, the opinion decides the case on another issue and does not reach the *Brady* claim, or the opinion contains no discussion of a *Brady* claim.

Not Favorable: The decision resolves the *Brady* claim by holding that the information at issue is not favorable because it lacks exculpatory, impeachment, or mitigating value.

Not Material: The decision resolves the *Brady* claim by holding that the information at issue is not material because there is no reasonable probability that the result would have been different had the information been disclosed and/or the withheld information cannot reasonably be viewed to put the whole case in such a different light as to undermine confidence in the verdict.

No Withholding/Not Withheld: The decision resolves the *Brady* claim by finding the information at issue was not withheld, that it was disclosed, or that the prosecution had no duty to disclose it.

Project Supervisors: VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, and VERITAS Initiative Pro Bono Research Attorney Todd Fries.

Research Team: The group of individuals who developed and executed the study, including VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, VERITAS Initiative Pro Bono Research Attorneys Todd Fries and Jessica Seargeant, and six law student volunteers from the Santa Clara University School of Law.

Statements: Information consisting of statements or declarations of fact, either oral or written, by any person. This includes transcripts, statements to or by police, misidentifications, or failures to identify the accused, and includes statements made by the victim, witnesses, co-defendants, and defendants.

State-Originated Decision/Case: Decision in which the underlying case originated in state court.

Study Sample: The complete set of 1,497 federal court decisions analyzed by the Research Team.

Theory of the Case: A theory of the case is an advocate's position and approach to the undisputed and disputed evidence that will be presented at trial. The theory of the case is usually developed before a trial begins and sets out the factual support for the verdict an advocate is seeking.

Undisclosed Favorable Information: Information that the Research Team determined to be favorable that was never disclosed to the defense.

Withheld Favorable Information: Information that the Research Team determined to be favorable that was never disclosed to the defense or was withheld by the government and then disclosed in an untimely manner.

AUTHOR BIOGRAPHIES

KATHLEEN "COOKIE" RIDOLFI is a Professor of Law at Santa Clara University School of Law and the cofounder and former Director of the Northern California Innocence Project. In 2004, she co-founded the Innocence Network, an affiliation of organizations dedicated to pursuing exonerations on behalf of wrongfully convicted prisoners and working to redress the causes of wrongful conviction. She was lead researcher and co-author of *Preventable Error, A Report on Prosecutorial Misconduct in California* 1997-2009. From 2004-2008, she served on the California Commission on the Fair Administration of Justice tasked with the study and review of the administration of criminal justice in California.

In 2010, Professor Ridolfi launched the VERITAS Initiative, a research and policy program at Santa Clara University School of Law committed to pursuing data-driven justice reform. She remains committed to educating law students by teaching in the areas of criminal law, wrongful conviction, and legal ethics. Professor Ridolfi has been the recipient of numerous awards, including California Lawyer Magazine Attorney of the Year, Women Defenders Annual Award, and the ACLU's Don Edwards Civil Liberties Award. She has also been recognized by the Daily Journal as one of the top 75 women litigators in California.

TIFFANY M. JOSLYN serves as Counsel for White Collar Crime Policy at the National Association of Criminal Defense Lawyers (NACDL). In this capacity, she tracks and analyzes criminal legislation in order to prevent overcriminalization, overfederalization, and the further erosion of *mens rea*. Ms. Joslyn works on various advocacy and education initiatives in these areas and criminal justice reform generally. She has authored papers and articles on white collar and criminal justice litigation, legislation, and policy. Ms. Joslyn served as NACDL's lead researcher on two intensive research studies and is co-author of *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*. She regularly collaborates with an ideologically diverse coalition of organizations in support of a bipartisan reform agenda and works with the nation's top criminal defense lawyers to develop and execute two national seminars annually.

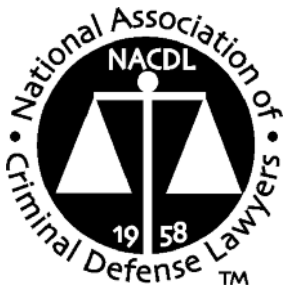
Prior to joining NACDL, Ms. Joslyn clerked for the Honorable John R. Fisher of the District of Columbia Court of Appeals. She graduated with honors from George Washington University Law School, where she co-authored the 2006-07 Van Vleck Constitutional Law Moot Court Competition Problem and served as Co-President of Street Law. Ms. Joslyn graduated *summa cum laude* from Clark University, where she majored in American Government with concentrations in Law, Ethics, and Public Policy.

TODD H. FRIES is a Pro Bono Research Attorney with the VERITAS Initiative at the Santa Clara University School of Law and the Operations Director for the Northern California Innocence Project (NCIP). His work on behalf of the VERITAS Initiative began in 2011, when he coordinated a multi-state research effort and national speaking tour focused on prosecutorial misconduct. As Operations Director for NCIP, Mr. Fries is responsible for enhancing the organization's internal processes and infrastructure to increase its efficiency, effectiveness, and sustainability. He joined NCIP in 2010 as a Research Attorney focusing on policy initiatives to help prevent wrongful conviction.

Prior to working at the VERITAS Initiative and NCIP, Mr. Fries worked as an Employment Litigation Associate at Paul Hastings LLP in Palo Alto and as an attorney at the Santa Clara County Superior Court Family Law Self-Help Office. He graduated cum laude from Santa Clara University School of Law in 2009 with a certificate in Public Interest and Social Justice after receiving a Bachelor of Arts from the University of California, Los Angeles.

NOTES

This publication is available online at
www.nacdl.org/discoveryreform/materialindifference



NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

1660 L Street NW, 12th Floor

Washington, DC 20036

Phone: 202-872-8600

www.nacdl.org